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Supreme Court of the United States

OCTOBER TERM, 1942

No. 327

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FRED FISHER MUSIC CO., INC., AND GEORGE  
GRAFF, JR., PETITIONERS.

vs.

M. WITMARK & SONS

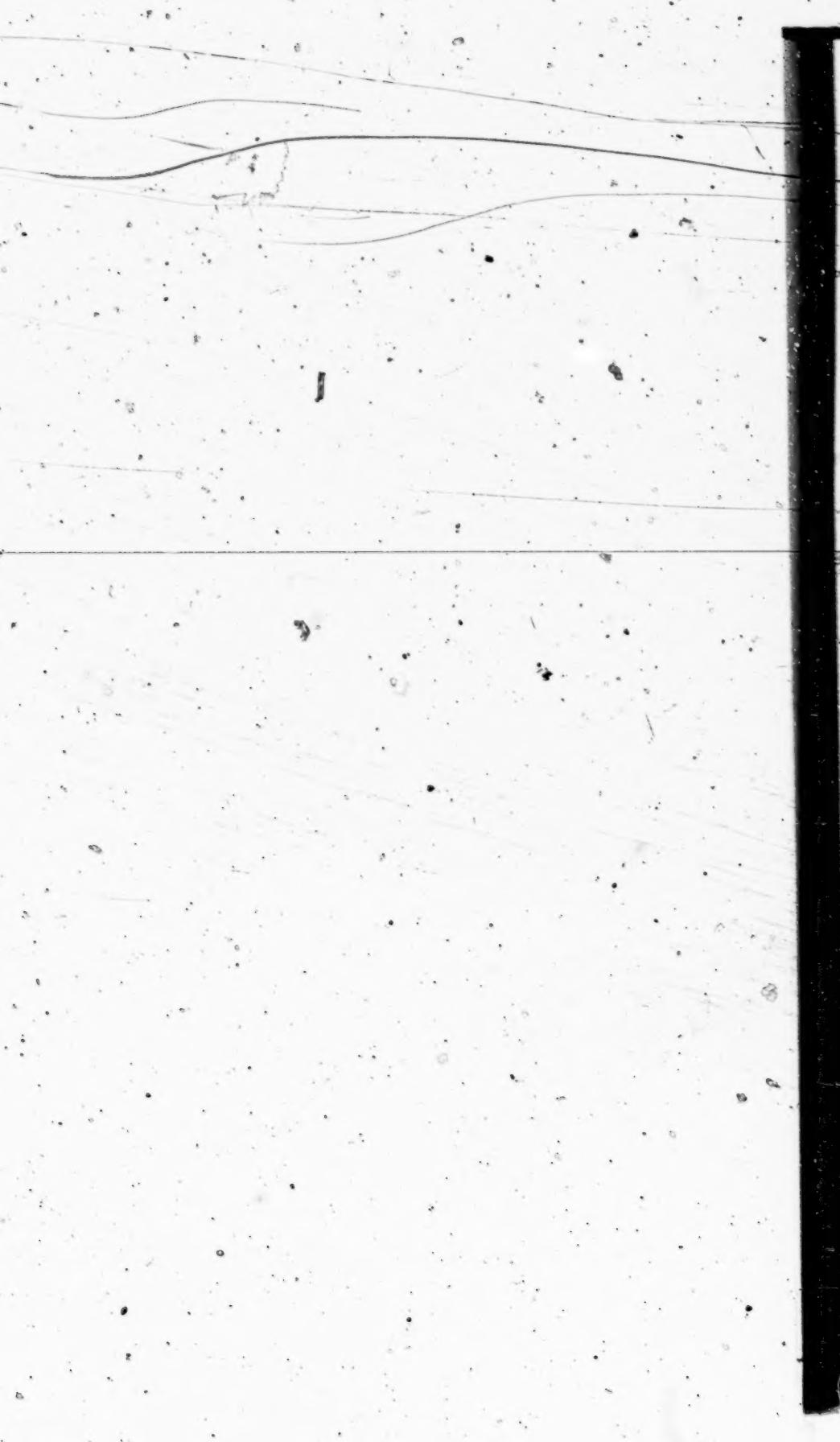
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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT  
OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR CERTIORARI FILED AUGUST 21, 1942.

CERTIORARI GRANTED OCTOBER 12, 1942.



SUPREME COURT OF THE UNITED STATES

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vs.

M. WITMARK & SONS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT  
OF APPEALS FOR THE SECOND CIRCUIT

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[fol. 1]

**IN DISTRICT COURT OF THE UNITED STATES FOR  
THE SOUTHERN DISTRICT OF NEW YORK**

M. WITMARK & SONS, Plaintiff-Appellee,  
against

FRED FISHER MUSIC CO., INC., GEORGE GRAFF, JR., Defendants-Appellants,

and

MILLS MUSIC, INC., Defendant

**STATEMENT UNDER RULE 13, SUBDIVISION 4**

This action was commenced on the 18th day of October, 1940.

The names of the parties are stated above; and there has been no change of parties.

The complaint was filed in the office of the Clerk of the United States District Court for the Southern District of New York on October 18th, 1940.

The defendants were not arrested, no bail was taken, and no property attached or arrested.

The interlocutory decree against the defendants Fred Fisher Music Co., Inc. and George Graff, Jr. was made by Hon. Edward A. Ganger, and entered on May 26, 1941. No question was referred to any commissioner, master or referee.

The defendants Fred Fisher Music Co., Inc. and George Graff, Jr. filed their notice of appeal on June 24th, 1941.

The defendant Mills Music, Inc. was not affected by the interlocutory decree and did not file a notice of appeal therefrom.

[fol. 2] **IN DISTRICT COURT OF THE UNITED STATES**

{Title omitted}

**NOTICE OF MOTION FOR INJUNCTION—Oct. 18, 1940**

Sms:

Please take notice that upon the annexed affidavit of Herman Starr duly sworn to the 18th day of October, 1940, and

upon the summons and complaint herein, and the exhibits thereto annexed, the undersigned will move this court at a Motion Term thereof to be held at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York, in Room 506 thereof, on the 29th day of October, 1940, at 10:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, for an order enjoining and restraining pendente lite defendant, Fred Fisher Music Co., Inc., its officers, employees, agents and servants, and defendant, George Graff, Jr., his agents and servants from printing, publishing, copying, vending or making any use whatsoever of the song entitled "When Irish Eyes Are Smiling", and from making any claim that they have any rights in this song, and for such other and further relief as to the court may seem just and proper in the premises.

[fol. 3] Dated, New York, October 18th, 1940.

Yours, etc., R. W. Perkins, Attorney for Plaintiff,  
Office & P. O. Address, 321 West 44th Street, Borough of Manhattan, City of New York.

To: George Graff, Jr. Fred Fisher Music Co. Inc.

[fol. 4] IN DISTRICT COURT OF THE UNITED STATES

[Title omitted]

AFFIDAVIT OF HERMAN STARR, IN SUPPORT OF MOTION

STATE OF NEW YORK,

County of New York, ss.:

HERMAN STARR, being duly sworn, deposes and says: I am the President of M. Witmark & Sons, the plaintiff in the above entitled action.

This affidavit is in support of plaintiff's motion for an injunction pendente lite restraining defendants, Fred Fisher Music Co., Inc. and George Graff, Jr. from printing, publishing, copying or vending, and from making any use whatsoever of the song entitled "When Irish Eyes Are Smiling". No preliminary relief is being requested against defendant, Mills Music Inc., because it has not threatened any immediate publication of the song.

This motion is made simultaneously with the commencement of this action by the service of a summons and complaint and these motion papers.

{fol. 5] I beg leave to refer to the complaint and exhibits thereto annexed, which are also annexed to this affidavit, and desire to incorporate the contents of the same into this affidavit with the same force and effect as if all of the allegations therein recited were repeated in this affidavit.

Plaintiff, M. Witmark & Sons is engaged in the business of publishing musical compositions. It is one of the oldest companies in the music publishing field, having started in business as early as 1885. It has built up a very large repertory of many of the world's most famous secular and sacred ballads and is probably unequalled in this field of musical compositions.

The song which is the subject of this litigation is entitled "When Irish Eyes Are Smiling". It is one of the most celebrated ballads of our times, being known probably in every household in America. I shall refer to it hereafter as the "song".

The song was written in 1912, being the joint composition of Ernest Ball, who wrote the music, and George Graff, Jr. and Chauncey Oleott, who wrote the lyrics. Ball and Graff at that time were under a general contract to Witmark.

Ball's general agreement with Witmark is dated January 2, 1908, and under it he agreed to deliver to Witmark all musical compositions which he would write, either alone or in conjunction with others, during the five (5) year period commencing January 2, 1908, and he agreed that upon the song being written, it would become the "sole and absolute property" of Witmark and he granted to Witmark "the copyright or copyrights of, with renewals and with right to copyright and renew, and property," in all the musical compositions which he would write within that five (5) year period. In consideration, Witmark agreed to pay Ball certain royalties. This agreement is annexed to the complaint as Exhibit "A".

{fol. 6] The Graff general contract with Witmark is dated July 1, 1910, and under it he also agreed to deliver to Witmark all musical compositions which he, alone or in conjunctions with others, would write during the five (5) year period commencing July 1, 1910, and he covenanted and agreed that the musical compositions which he wrote during that period would become the "sole and absolute property" of Witmark, and he granted to Witmark "the copyright or copyrights of, with renewals and with right to copyright and renew, and property" in all the musical compositions

4  
which he would write during the ensuing five (5) year period. Witmark in turn agreed to pay Graff royalties of 2¢ for each copy sold of any standard number of which Graff wrote the words. (A copy of the agreement between Graff and Witmark is annexed to the complaint as Exhibit "B".

The song was written in the year 1912, prior to August 12th of that year and obviously is covered in the aforesaid general contracts of Graff and Ball. Olcott was not at the time under general contract to Witmark but he made an oral grant of his rights to Witmark which he confirmed by written agreement of January 17, 1913, which is annexed to this affidavit as Exhibit "1".

After the song was jointly written by Messrs. Ball, Graff and Olcott, it was delivered to Witmark which, on August 12, 1912 copyrighted it in its name. Witmark then launched its publication of the song and, as stated above, it became a great success. Royalties were paid to the writers pursuant to their separate agreements with Witmark. Nothing further happened until about five (5) years after the work was copyrighted.

Then, on May 19, 1917, for the sum of One Thousand Six Hundred (\$1,600.00) Dollars, Graff released Witmark from any further obligation to pay royalties for this song and [fol. 7] certain other songs, and in the same instrument for the same consideration, he sold, assigned, transferred and delivered to Witmark the song "When Irish Eyes Are Smiling", "to have and to hold the same absolutely unto the said publisher (Witmark) \*\*\* together with all rights, therein for all countries \*\*\* and all copyrights and renewals of copyright and the right to secure all copyrights and renewals of copyrights \*\*\* and any and all rights therein that I or my heirs, executors, administrators or next of kin, may at any time be entitled." Mr. Graff further agreed "and I do, for myself, my heirs, executors, administrators and next of kin, hereby irrevocably authorize and appoint the publisher, its successor, successors and assigns, my attorneys and representatives, *in my name* or in the names of my heirs, executors, administrators and next of kin, or in its own names, to take and do such actions, deeds and things, and make, sign, execute and acknowledge all such documents, as may from time to time be necessary, to secure to the publisher (Witmark), its successor, successors and assigns, the renewals and extensions of the

copyrights in said compositions and of rights therein for the term of such renewals and extensions". (italics ours)

It is scarcely conceivable that any clearer language could be used to express Mr. Graff's intent to vest the renewal rights in the song in Witmark.

On November 21, 1935, the aforesaid instrument of May 19, 1917 was recorded in the copyright office.

August 12, 1939 ushered in the beginning of the 28th year of the original copyright, and with it the beginning of the yearly period within which the renewal could be secured. Mr. Graff was the only survivor of the writers of this song. Both Mr. Ball and Mr. Olcott had previously passed away, each survived by his respective widow. Thereupon Witmark, on August 12, 1939, acting upon the authority of Mr. Graff contained in the said instrument of May 19, 1917, as well as upon authority from Mrs. Olcott, made an application in the name of Mr. Graff and Mrs. Olcott for the registration of the renewal copyright, and the renewal copyright was thus registered in the name of Mr. Graff and Mrs. Olcott on that day. The same day, further acting under the authority of the May 19, 1917, instrument, Witmark acting in the name of Mr. Graff, assigned his renewal copyright to itself, and this assignment was recorded on August 14, 1939, in the office of the Register of Copyrights. It is annexed to the complaint as Exhibit "F". Mrs. Olcott for fixed royalties also assigned her renewal interest to Witmark on August 29, 1939 and that assignment was recorded in the copyright office on August 29, 1939. It is annexed to the complaint as Exhibit "G".

For more than twenty (20) years after the instrument of May 19, 1917 was executed, Graff did and said nothing in repudiation thereof. Then on August 23, 1939, Graff purported to obtain a renewal copyright in the song in his own name although, if he had examined the records of the Copyright Office, he would have ascertained that eleven (11) days earlier, Witmark had taken out the renewal in his name and Mrs. Olcott's and had assigned the renewal to itself. Finally, on October 24, 1939, being two months later, he executed a document to defendant, Fred Fisher Music Co., Inc. (hereinafter referred to as Fisher) which is annexed to the complaint as Exhibit "I" in which he purports for \$1.00 and other good and valuable consideration to sell his renewal copyright in the song to Fisher. And

this he did in brazen violation of his agreements with Witmark of July 1, 1910 and May 19, 1917, in both of which, in the clearest of language, he vested his renewal rights in [fol. 9] Witmark. The conduct of Fisher is equally reprehensible. Fisher must be charged with notice of the prior renewal registration of August 12, 1939 and the prior recorded assignment of that renewal to Witmark of the same date. It must also be charged with knowledge of the recorded instrument of May 19, 1917. There can be no question but that Graff and Fisher acted with the utmost bad faith in their transaction and with full knowledge of Witmark's prior and superior rights.

On August 13, 1940, Fisher wrote to Witmark (a copy of the letter being annexed to this affidavit marked Exhibit "2") claiming that it was the owner of the George Graff renewal rights in the song and asking Witmark to remove the song from its catalogue. On August 26, 1940, Witmark answered Fisher notifying it that Fisher was not the owner of Graff's renewal rights, and calling upon Fisher to remove the song from its catalogue; to cease and desist from publishing the same and to retract publicly any claim made by it to the effect that it had the right to publish the song. That letter is annexed to this affidavit marked Exhibit "3." On September 5, 1940, Fisher replied to Witmark (a copy of which reply is annexed hereto and marked Exhibit "4"), wherein among other things it advised that it was publishing and would continue to publish the song. A copy of said Fisher's infringing song is annexed to the complaint and marked Exhibit "M."

During all of this period, Fisher has sent letters to the trade claiming ownership of the renewal copyright in the song. Annexed hereto and marked Exhibit "5" is a photostatic copy of such a letter which Fisher wrote to Lyon & Healy Inc. of Chicago, a 'jobber' of sheet-music, which sells sheet music to retailers. Lyon & Healy Inc. forwarded this letter to Witmark inquiring as to the validity of Fisher's [fol. 10] claim. Obviously because of Fisher's claim, Lyon & Healy Inc. which has always been a customer of Witmark in purchasing sheet music of this song, is now placed in a position of not knowing with whom to deal for the song. Annexed hereto and marked Exhibit "6" is a letter received by Witmark from the American Society of Composers, Authors and Publishers, advising Witmark of a letter received

by the Society from Fisher in which Fisher makes the same claim. The Society is an organization composed of writers and publishers (of which Graff and Witmark are members), which is engaged in the business of licensing radio companies, hotels, night clubs and other users of music to perform publicly for profit, the musical compositions of its members. Its revenues, which run into the millions, are divided among its members, and in the division of its revenue, the uses of each song over the air constitute a factor. Last year alone there were 6,335 radio uses of the song, "When Irish Eyes Are Smiling." Fisher now seeks to have the Society credit such uses to Fisher. Thus the Society also is in a position as a result of Fisher's claim, of not knowing to whom to credit the uses of this song. Deponent has been informed and verily believes that similar claims have been made by Fisher to manufacturers of phonograph records and other users of music.

It is apparent that Fisher's claim is a definite cloud upon plaintiff's title to the renewal rights, and Fisher's conduct in advising the trade that it owns the renewal copyright in this song has created considerable confusion among the customers of Witmark which must result, unless a preliminary injunction is granted, in the curtailment if not stoppage in the use of this song. And unless Fisher is immediately stopped by the granting of a preliminary injunction, plaintiff will suffer substantial monetary damage by [fol. 11] reason of Fisher's interference with plaintiff's ability to exploit fully the various rights it has in the song, which include not only the publication rights, but also the right to license it for use on phonograph records, electrical transcriptions for radio broadcasting, use in motion pictures, and use over the radio. The reputation of Witmark as publisher of the world's most famous ballads including the song in question, is being jeopardized by Fisher's claim of right to publish this song. Moreover, we are informed and believe that Fisher's financial position is such that it cannot satisfy a judgment for the amount of damages that it has caused and will cause defendant by virtue of its conduct.

Deponent submits that irreparable injury is being done to this plaintiff and deponent, therefore, respectfully prays that a preliminary injunction issue enjoining defendants Graff and Fisher from printing, publishing, copying or

vending the song, and from making any use thereof whatsoever, and from making any claim that it has any rights in this song.

Herman Starr.

Sworn to before me this 18th day of October, 1940.

Joseph J. McLaughlin, N. Y. County, No. 247.  
Commission expires March 30, 1941.

[fol. 12] EXHIBIT "I," TO AFFIDAVIT OF HERMAN STARR

Duplicate

WORDS & MUSIC

Executive Offices of M. Witmark & Sons, Publishers, Witmark Building, New York

In Consideration of the sum of One Dollar to me in hand paid by M. Witmark & Sons and the further payment by it to me of Three Cents (3¢) upon each and every copy of said musical composition for Voice & Piano, hereafter sold by it, (no royalties, however, to be paid on copies sold as new issues, nor upon any arrangements, except as above specified), except such copies as are sold in foreign countries, upon which half royalties shall be paid,\* I do hereby sell, assign, set over and transfer to and unto the said M. Witmark & Sons, its successors and assigns, a certain song, words, music and musical composition, bearing the title

- 1. "When Irish Eyes Are Smiling"
- 2. "Kathleen Aroon"
- 3. "Isle O'Dreams"

and the copyright of the same, the right to take out a copyright, also renewal of copyright, for or upon the same, and each and every part thereof, including the title thereof, in its own name as owner and proprietor of said song, words, music and musical composition, to the same full extent in [fol. 13] all respects as I might, could, would or should do, or be able to do, had this present instrument not been made, together with all mechanical reproducing rights in said composition, for which rights M. Witmark & Sons agree to collect and pay me, and all persons jointly interested with me

in said composition, one-half of all sums realized by it from said rights, and I do hereby, for myself and heirs, executors, administrators covenant to and with the said M. Witmark & Sons, its successors and assigns, that I have not sold, assigned, set over, transferred, hypothecated or mortgaged said song, words, music or musical composition, or any interest therein, nor in the copyright thereof, and that there is not now and has not been any contract existing between me and any other person, firm or corporation whomsoever, affecting any rights, title, or interest in said song, words, music or musical composition or in or to the copyright thereof, and I do hereby certify that it is upon the faith of these representations, that the said M. Witmark & Sons has purchased said song, words, music and musical composition from me and has agreed to copyright and publish the same.

Settlements under this contract shall be made on the 15th day of January and July in each year during the existence of said copyright.

And the said M. Witmark & Sons hereby covenants and agrees to pay the royalties aforesaid, to Chauncey Oleott upon the faith of the representations herein made.

Should M. Witmark & Sons desire to publish the aforesaid composition in a collection of music in book or album form, they may do so without the payment of any royalty on said books.

[fol. 14] In witness whereof the parties hereto have executed this agreement in duplicate at New York in the State of New York this Seventeenth day of January, 1913.

\*On copies sold at less than regular rates, it is understood and agreed that half royalty is to be paid.

M. Witmark & Sons, Julius P. Witmark, Sec'y;  
Chauncey Oleott.

STATE OF —

County of —, ss.:

On this — day of —, 19— before me came and appeared personally — to me known to be one of the persons mentioned and described in the foregoing instrument, and who executed the same, and he duly acknowledged to me

that he executed the same for the uses, intents and purposes, therein mentioned.

N. B.—"New Issues" are sample copies sent to the trade at five cents (which just about covers the cost of production, etc.) and are filed by the dealer for record. No number is ever sent out in "new issues" more than once, and not more than one thousand copies are ever, under any circumstances, sent in this way by us.

[fol. 15] EXHIBIT "2," TO AFFIDAVIT OF HERMAN STARR

Phone: Columbus 5-1976.

Fred Fisher Music Co., Inc.

Music Publishers

1619 Broadway, New York City

August 13, 1940.

Music Publishers Holding Co., 1250 Sixth Avenue, New York, N. Y.

GENTLEMEN:

This is to advise you that we are the owners of the George Graff renewal rights to the musical composition entitled:

When Irish Eyes Are Smiling

As you know, the original copyright on the aforementioned composition has expired and we are the assignees of the renewal copyright on said composition.

Will you please remove this composition from your catalog.

Very truly yours, Fred Fisher Music Co., Inc., Fred Fisher.

FF:FB.

## [fol. 16] EXHIBIT "3," TO AFFIDAVIT OF HERMAN STARR

Copy

August 26th, 1940.

Fred Fisher Music Co., Inc., 1619 Broadway, New York,  
N. Y.

GENTLEMEN:

We have your letter of August 13, 1940, wherein you state that you are the owners of the George Graff renewal rights in the song entitled "When Irish Eyes Are Smiling," and wherein you request us to remove this song from our catalogue.

We herewith notify you that you are not the owner of Mr. Graff's renewal rights in this song, for the reason that Mr. Graff had assigned to us his renewal rights in this song prior to any time that you may purport to have acquired any rights from him, viz: by instrument dated May 19th, 1917, recorded in the U. S. Copyright Office on November 19th, 1935, and by instrument dated August 12, 1939, recorded in the U. S. Copyright Office on August 14, 1939, and you are, therefore, charged with notice of these assignments. Consequently, any assignment which he may have purported to make to you is a nullity.

In addition, we want you to know that we are also the assignee of the renewal copyright in this song of Margaret O'Donovan Oleott, widow of Chauncey Oleott, who was a joint author of the song.

Accordingly, we hereby call upon you forthwith to remove this song from your catalogue, to cease and desist from publishing the same, and to retract publicly any [fol. 17] claim which may have been made by you to the trade to the effect that you have the right to publish this song. Upon your failure to do so, we shall take appropriate legal steps to protect our interests.

Very truly yours, M. Witmark & Sons, by — — —

Registered mail. /

Return receipt requested.

## EXHIBIT "4" TO AFFIDAVIT OF HERMAN STARR

Phone: Columbus 5-1976.

Fred Fisher Music Co., Inc.

Music Publishers

1619 Broadway, New York City

September 5, 1940.

Music Publishers Holding Corporation, R. C. A. Building,  
1250 Sixth Avenue, New York City.

GENTLEMEN:

We are in receipt of your letter of August 26, 1940, with reference to the renewal rights in the song entitled "When Irish Eyes Are Smiling."

[fol. 18] In the event that you are an assignee of a renewal copyright in the song secured by Margaret O'Donovan Oleott, widow of Chauncey Oleott, then, of course, you may have a non-exclusive right to publish.

We again wish to point out that we are publishing the song as assignee of the renewal copyright secured by Mr. George Graff, Jr., one of the co-authors.

In your letter of August 26, 1940, you refer to a certain instrument executed by Mr. Graff and dated May 19, 1917. We wish to call your attention to the fact that this instrument is presently the subject of litigation in *Whitmark v. Fisher et al.* now pending in the United States District Court. You are, therefore, familiar with construction which we place upon this instrument. Accordingly, it is our intention to continue to publish the song as assignee of the renewal copyright of George Graff, Jr.

Very truly yours, Fred Fisher Music Co., by Fred Fisher.

[fol. 19] EXHIBIT "5," TO AFFIDAVIT OF HERMAN STARR

Phone: Columbus 5-1976.

Fred Fisher Music Co., Inc.  
Music Publishers  
1619 Broadway, New York City

August 13, 1940.

Lyon & Healy, Inc., Wabash Ave. at Jackson Blvd., Chicago, Ill.

GENTLEMEN:

This is to advise you that we are the owners of the renewal copyright of the musical composition entitled:

When Irish Eyes Are Smiling

As you know, the original copyright on the aforementioned song has expired and we are the assignees of the renewal copyright on said composition.

Very truly yours, Fred Fisher, Fred Fisher Music Co., Inc.

[fol. 20] EXHIBIT "6," TO AFFIDAVIT OF HERMAN STARR

American Society of Composers, Authors and Publishers  
Thirty Rockefeller Plaza  
New York City

September 25th, 1940.

M. Whitmark & Sons, 1250 Sixth Avenue, New York,  
N. Y.

GENTLEMEN:

In re: "When Irish Eyes Are Smiling," words by Chauncey Oleott & George Graff, Jr., music by Ernest R. Ball

Under date of August 13th, 1940, Fred Fisher Music Co., Inc., wrote us as follows:

"This is to advise you that we are the owners of the George Graff renewal rights to the musical composition entitled:

"When Irish Eyes Are Smiling"

As you know, the original copyright on the aforementioned composition has expired and we are the assignees of the

renewal copyright on said composition. Please see that all points due us are recorded."

May we please have your comment?

Yours very truly, American Society of Composers,  
Authors and Publishers, A. W. Klingmann, A.  
W. Klingmann.

awk:ovb.

[fol. 21] IN DISTRICT COURT OF THE UNITED STATES

COMPLAINT—FILED Oct. 18, 1940

Plaintiff herein, by R. W. Perkins, its solicitor, for its complaint against defendants herein, respectfully shows to the court and avers:

1. That the cause of action herein arises under the Copyright Laws of the United States.
2. That plaintiff, at all times hereinafter mentioned, was and still is a corporation duly organized and existing under and by virtue of the laws of the State of New York, a resident of the City and State of New York, and of the Southern District of New York, and at all times hereinafter mentioned, was and still is engaged in the business of printing, publishing and vending copyrighted musical compositions.
3. Upon information and belief, that defendant, Fred Fisher Music Co., Inc., at all the times hereinafter mentioned, was and still is a corporation duly organized and existing under and by virtue of the laws of the State of New York, a resident of the City and State of New York, and of the Southern District of New York, and at all times hereinafter mentioned, was and still is engaged in the business of printing, publishing and vending copyrighted musical compositions.
4. Upon information and belief that defendant Mills Music, Inc., at all the times hereinafter mentioned was and still is a corporation duly organized and existing under and by virtue of the laws of the State of New York, a resident of the City and State of New York, and of the Southern District of New York, and at all times hereinafter

mentioned, was and still is engaged in the business of printing, publishing and vending copyrighted musical compositions.

5. Upon information and belief that defendant, George Graff, Jr., was at all times hereinafter mentioned and still is a citizen of the United States, a resident of the State of New York, County of New York and Southern District of New York.

6. That heretofore and on or about the 2nd day of January, 1908, plaintiff entered into a certain agreement with one, Ernest R. Ball, a copy of which said agreement is annexed hereto and marked Exhibit "A." That under said agreement, Ball covenanted and agreed to deliver to plaintiff any and all musical compositions which he alone, or in conjunction with others, would compose during the period of five (5) years commencing January 2nd, 1908, and he covenanted and agreed that all musical compositions thus composed by him during said five (5) year period would immediately upon being composed become and be the sole and absolute property of plaintiff, and he granted and conveyed to plaintiff "the copyright or copyrights of, with renewals and with right to copyright and renew, and property in any and all musical compositions which he would compose during the said five (5) year period."

7. That on or about the 1st day of July, 1910, plaintiff entered into a certain agreement with one, George Graff, [fol. 23] Jr., a copy of which agreement is annexed hereto and marked Exhibit "B." That under said agreement Graff covenanted and agreed to deliver to Witmark any and all compositions which he alone, or in conjunction with others, would compose during the period of five (5) years beginning July 1, 1910, and he covenanted and agreed that any and all musical compositions which he would thus compose during said five (5) year period would immediately upon the same being composed become the sole and absolute property of plaintiff, and he granted and conveyed to plaintiff "the copyright or copyrights of, with renewals and with right to copyright and renew and property in any and all musical compositions which he would compose during said five (5) year period."

8. That thereafter and prior to August 12, 1912, and while said agreements were in full force and effect, the said Ernest R. Ball and the said George Graff, Jr. and one Chauncey Olcott hereinafter respectively referred to as "Ball" and "Graff," and "Olcott," jointly composed a certain musical composition entitled "When Irish Eyes Are Smiling," hereinafter referred to as "said song," the music thereof having been written by the said Ball and the lyrics thereof by the said Graff and Olcott.

9. That thereafter and prior to August 12, 1912, by agreement between Olcott and plaintiff, for valuable consideration, said Olcott sold and assigned to plaintiff said song and the copyright thereof and the right to take out copyright thereof in the name of plaintiff.

10. That thereafter said Graff and Ball and Olcott pursuant to said agreements delivered said song to plaintiff.

11. That said song was new and original with Graff, Ball and Olcott and is copyrightable subject matter under the laws of the United States.

[fol. 24] 12. Upon information and belief that Graff, Ball and Olcott were, at the time herein mentioned, citizens of the United States.

13. That thereafter plaintiff, pursuant to the rights acquired by it under said agreements, and in compliance in all respects with the provisions of the Act of March 4th, 1909, governing copyright, and all other laws governing copyright, did duly copyright said song in its name on August 12, 1912 by publishing the same on said date, and offering the same for sale to the general public with the following notice of copyright applied on the page immediately following the title page:

"Copyright MCMXII by M. Witmark & Sons."

14. That after publication of said song with the said notice of copyright, plaintiff promptly and on the 14th day of August, 1912, duly deposited in the Copyright Office in Washington, District of Columbia, two complete copies of the best edition of said song then published accompanied by a claim of copyright; and paid to the Register of Copyrights the fee prescribed by law for the registration of said song; and said song was duly regis-

tered for copyright in the name of plaintiff by said Register of Copyrights, and the Register of Copyrights issued to plaintiff a certificate of copyright registration of said composition. That annexed hereto and marked Exhibit "C" is a copy of said certificate of copyright registration.

15. That plaintiff complied in all respects with the Act of March 4, 1909 governing copyrights, and all other laws and regulations governing copyright and secured the exclusive rights and privileges in and to the copyright of said song.

[fol. 25] 16. That since August 12, 1912, said song has been published by plaintiff, and upon each copy thereof published or offered for sale in the United States by authority of plaintiff there was affixed the notice of copyright set forth in paragraph "13" hereof on the page immediately following the title page.

17. That thereafter and on or about the 19th day of May, 1917, said Graff did execute a certain instrument dated May 19, 1917, a copy of which is annexed hereto and marked Exhibit "D" whereby he conveyed to plaintiff, for good and valuable consideration, the copyright and renewal copyright of said song, including the right to secure renewal of the copyright thereof, and any and all rights in said song that Graff might at any time be entitled to, and Graff did by the same instrument irrevocably authorize and appoint plaintiff as his attorney and representative in his name or in its own name to take and do such actions, deeds and things and to make, sign, execute and acknowledge all such documents as might from time to time be necessary to secure to plaintiff the renewal and extension of the copyright in said song and all rights therein for the term of such renewal and extension.

That said instrument of May 19, 1917, was duly recorded in the United States Copyright Office on November 19, 1935 in book 340, pages 217-219 in conformity with the laws of the United States respecting copyrights as appears from the copy of the certificate of recordation annexed to said instrument of May 19, 1917.

18. That said Graff was alive on August 11, 1940, the date on which the original twenty-eight year period of said copyright in said song expired and Graff is still alive.

[fol. 26] 19. That said Ball died prior to August 11, 1939, leaving a surviving widow named Maud L. Ball who is still alive.

20. That said Oleott died prior to August 11, 1939 leaving a surviving widow named Margaret O'Donovan Oleott who is still alive.

21. That pursuant to the rights and authority granted to plaintiff by Graff in said instrument of May 19, 1917, and pursuant to authority granted to plaintiff by said Margaret O'Donovan Oleott, plaintiff did on August 12, 1939, being within the one year period prior to the expiration of the said copyright in said song, duly file in conformity with the said Act of March 4, 1909 governing Copyright and all other laws and regulations governing copyright, in the Copyright Office in Washington, D. C., an application for the renewal and extension of the copyright in said song in the name of Graff and said Margaret O'Donovan Oleott and said application was duly registered in the Copyright Office by the Register of Copyrights, and the Register of Copyrights did duly issue a certificate of said registration dated August 12, 1939, a copy of which is annexed hereto and marked Exhibit "E".

22. That pursuant to the rights and authority granted to plaintiff in said instrument of May 19th, 1917, plaintiff, as the attorney and representative of Graff, did duly assign to plaintiff the said renewal copyright by instrument dated August 12, 1939, a copy of which is annexed hereto and marked Exhibit "F". That said instrument dated August 12, 1939 was duly recorded in the Copyright Office on August 12, 1939 in book 422, page 150, in conformity with the laws of the United States respecting copyrights, as appears from the copy of the certificate of recordation attached to said instrument dated August 12, 1939.

[fol. 27] 23. That said Margaret O'Donovan Oleott also did duly assign to plaintiff said renewal copyright by instrument dated August 28, 1939, in consideration for which plaintiff agreed to pay said Oleott by an agreement of the

same date, fixed royalties. A copy of the said assignment is annexed hereto and marked Exhibit "G". That said assignment, dated August 28, 1939 was duly recorded in the Copyright Office on August 29, 1939 in book 423, page 93, in conformity with the laws of the United States respecting copyrights, as appears from the copy of the certificate of recordation attached to said instrument dated August 28, 1939.

24. That by virtue of said acts, plaintiff became and now is the sole owner of the renewal copyright in said song and all rights of every name and nature whatsoever in said renewal copyright.

25. Upon information and belief on or about August 23, 1939, defendant Graff, having previously assigned the renewal copyright in said song to plaintiff, in derogation and in violation of his previous agreements with and grants to plaintiff and without any authority whatsoever from plaintiff, and in violation of plaintiff's rights, filed an application for the renewal and extension of the copyright in said song in the name of said Graff which application was registered in the Copyright Office by the Register of Copyrights, and the Register of Copyrights did issue to said Graff what purports to be a certificate of said registration dated August 23, 1939, a copy of which is annexed hereto and marked Exhibit "H".

26. Upon information and belief that by instrument dated October 24, 1939, a copy of which is hereunto annexed and marked Exhibit "I", defendant Graff with full [fol. 28] knowledge of the rights of plaintiff, and in violation of plaintiff's rights, and in derogation and violation of the aforesaid agreements and grants theretofore entered into between himself and plaintiff, purported to sell and assign to defendant Fred Fisher Music Co. Inc., which also had full knowledge of plaintiff's rights, the purported renewal copyright in the said song mentioned in paragraph "25" hereof. That said instrument of October 24, 1939 was recorded in the Copyright Office in Washington, D. C. on January 24, 1940 in book 432, page 123.

27. Upon information and belief that on or about November 15, 1939 Maud Lambert Ball without any authority whatsoever from plaintiff and in violation of plaintiff's rights, filed an application for the renewal and extension

of the copyright in said song in the name of said Ball, which application was registered in the Copyright Office by the Register of Copyrights, and the Register of Copyrights did issue to said Ball what purports to be a certificate of said registration dated November 15, 1939, a copy of which is annexed hereto and marked Exhibit "J".

28. Upon information and belief that by instrument dated July 8, 1940, a copy of which is hereto annexed and marked Exhibit "K", Maud Lambert Ball, with full knowledge of the rights of plaintiff and in derogation and violation of plaintiff's rights purported to sell and assign to defendant Mills Music Inc., who also had full knowledge of plaintiff's rights, the renewal copyright in said song mentioned in paragraph "27". That said instrument of July 8, 1940 was recorded in the Copyright Office in Washington, D. C. on July 13, 1940 in book 443, pages 95-96.

29. Upon information and belief that since on or about August, 1940, defendant Fred Fisher Music Co., Inc. has been infringing and continues to infringe the renewal copyright in said song as follows: since said date said defendant, without the authority or consent of plaintiff and with full knowledge of plaintiff's rights in the premises, and acting solely in virtue of the aforesaid invalid assignment from Graff mentioned in paragraph "26" hereto, and without any authority from the plaintiff or anyone else other than the said Graff, has (a) been publishing, offering for sale and vending copies of said song, (b) made an arrangement of said song, (c) been publishing, offering for sale and vending copies of said arrangement, and said defendant continues and will continue and threatens to continue to do the aforesaid infringing acts unless prevented by the decree of this court.

30. That a copy of plaintiff's copyrighted song is hereto annexed as "Exhibit "L", and a copy of defendant, Fred Fisher Music Co., Inc.'s infringing copy thereof and arrangement thereof is hereto annexed as Exhibit "M".

31. That plaintiff has heretofore notified defendant, Fred Fisher Music Co., Inc., in writing, that said defendant has infringed said renewal copyright of plaintiff, and that said infringements should cease, but said defendant, Fred Fisher Music Co., Inc. has continued to infringe the said renewal copyright after receipt of said written notice.

32. Upon information and belief that since on or about August, 1940, defendant Mills Music Inc. without the authority or consent of plaintiff has asserted that it has the right to publish the said song and threatens to publish the same and will publish the same unless prevented by the decree of this court.

Wherefore plaintiff demands judgment as follows:

1. That defendant Fred Fisher Music Co., Inc., its officers, employees, agents and servants, defendant Mills [fol. 30] Music Inc., its officers, employees, agents and servants and defendant George Graff, Jr., his agents and servants, be enjoined during the pendency of this action and permanently from infringing said renewal copyright of plaintiff in any manner.
2. That said defendant Fred Fisher Music Co., Inc., and defendant Graff be required to pay to plaintiff such damages as plaintiff has sustained in consequence of their infringement of said renewal copyright and to account and pay over to plaintiff all the gains, profits and advantages derived by said defendant from their infringement of plaintiff's renewal copyright or such damages as to the court shall appear proper within the provisions of the Copyright Statutes, but not less than Two Hundred Fifty (\$250.00) Dollars.
3. That said defendant Fred Fisher Music Co., Inc., and Graff be required to deliver up to be impounded during the pendency of this action all copies in their possession or under their control infringing said renewal copyright and to deliver up for destruction all infringing copies of all plates, molds, and other matter for making such infringing copies.
4. That this court declare null and void the purported renewal registration of defendant Graff dated August 23, 1939, and the purported assignment from defendant Graff to defendant Fred Fisher Music Co., Inc. dated October 24, 1939; that said purported renewal copyright registration and said assignment be cancelled of record and that this court declare that said defendant Fred Fisher Music Co., Inc. and said defendant Mills Music Inc. and said defendant Graff have no rights of any nature whatsoever in the renewal copyright in said song.

[fol. 31] 5. That defendants Fred Fisher Music Co., Inc., Mills Music Inc., and Graff pay to plaintiff the costs of this action and reasonable attorney's fees to be allowed to the plaintiff by the court.

6. That plaintiff have such other and further relief as is just.

R. W. Perkins, Attorney for Plaintiff, Office & P. O.  
Address, 321 West 44th Street, Borough of Manhattan, City of New York.

EXHIBIT "A", TO COMPLAINT

Agreement, made this 2nd day of January, 1908, by and between M. Witmark & Sons, party of the first part, doing business in the Borough of Manhattan, City of New York, and Ernest R. Ball, composer, of the Borough of Manhattan, City of New York, party of the second part.

Wherefore, the party of the first part is desirous of acquiring the copyright of and property in all the musical compositions which the party of the second part may write [fol. 32] or compose alone, or in conjunction with others, or secure control of during the period of five (5) years from the date hereof:

Now, in consideration of the sum of One Dollar, by each of the parties hereto to the other in hand paid, the receipt whereof is hereby reciprocally acknowledged, and also in consideration of the covenants and conditions hereinafter contained.

This Agreement Witnesseth:

First: The party of the second part does hereby covenant and agree to deliver to the party of the first part any and all musical compositions which the party of the second part alone or in conjunction with others, may write or compose or acquire control of during the period of five (5) years, beginning from the date of this agreement, and the said party of the second part hereby expressly covenants and agrees that any and all musical compositions which said party of the second part may or shall write or compose or acquire control of during the period of five (5) years beginning from the date of this agreement, including the title words and music of any and all

such musical compositions, shall immediately upon the same being written or composed, or control thereof being secured, become and be the sole and absolute property of the party of the first part; and the party of the second part hereby expressly grants and conveys to the party of the first part, the copyright or copyrights of, with renewals and with right to copyright and renew, and property in any and all musical compositions which he may write or compose or acquire control of during said period of five (5) years, including the titles, words and music thereof. And the party of the second part hereby conveys, sells, transfers, assigns and delivers unto the party of the first part any and all musical compositions which he has heretofore written or composed, or has control of, either alone or in conjunction with others, and which are not subject to any contract for their sale or publication with any person, firm or corporation. And said party of the second part covenants and agrees not to write, compose or deliver to any person, firm or corporation other than the party of the first part, any musical composition at any time during the period of five (5) years beginning from the date of this agreement, or the titles, words or music of any such composition or any part thereof, and he will not permit any publisher, person, firm or corporation other than the party of the first part, to publish or in any manner use any such composition, title, words or music or any part thereof.

Second: The party of the second part hereby declares and covenants that he is entirely free and has good right to make this agreement; that he has not entered into any contract or agreement of any description which prevents him or could prevent him from carrying out in full the purposes of this contract. And the said party of the second part further covenants and agrees to protect and defend the right, title and interest of M. Witmark & Sons, to the fullest extent, in any composition or compositions which the said M. Witmark & Sons may acquire from the party of the second part.

Third: The party of the second part agrees that during each year of the term of this agreement, he will submit to the party of the first part for publication, all the new and original compositions written and composed by him alone, or in conjunction with others, or controlled by him, but

not less than twelve (12) compositions each year. The [fol. 34] party of the first part agrees to publish not less than six (6) of the compositions acquired from the party of the second part during each year of the term of this agreement. It is fully understood and agreed that complete works, such as comic operas, musical comedies or groups of numbers that may be written for either, and cycles are to be considered as single compositions.

Fourth: The party of the first part agrees to pay to the party of the second part for himself and those who may be jointly interested with him, a gross sum of four (4¢) cents when he furnishes both words and music, and a gross sum of two (2¢) cents when he furnishes either the words or music only, upon each and every copy sold by it of any composition which the party of the second part shall have written, composed or acquired control of either alone or in conjunction with others; also a gross sum of four (4¢) cents upon each and every copy sold by it of any instrumental number for piano, that may be written, composed or controlled by him alone, or in conjunction with others. It is fully understood that no royalties are to be paid upon arrangements of any kind, excepting for piano, upon which four (4¢) cents shall be paid on every copy sold by it, and that no royalties are to be paid upon copies disposed of as "new issues"; also that a sum equal to one-half of the above mentioned royalties is to be paid to the party of the second part by the party of the first part upon copies sold by the party of the first part in foreign countries. The party of the second part hereby assigns, transfers, sets over and delivers unto said party of the first part all mechanical rights in his compositions published by the party of the first part, and the said party of the first part agrees to pay to said party of the second part one-half of his share of all sums realized by it from the mechanical reproduction of such compositions.

[fol. 35] Fifth: The party of the first part hereby further agrees that it will render unto said party of the second part semi-annual statements on the 15th days of January and July of each year, showing all sales and royalties earned by said party of the second part, and any moneys which at any time may appear from such statements to be due, shall be paid to the party of the second part within thirty days thereafter.

Sixth: On the expiration of this agreement the party of the second part will renew this agreement for a further term of five (5) years upon the same terms and conditions as set forth and provided for in this agreement, provided that the said party of the first part shall at least six (6) months before the expiration of this agreement notify said party of the second part in writing of its intention to renew this agreement.

In Witness Whereof the parties hereto have hereunto executed this agreement in duplicate the day and year first above written.

M. Witmark & Sons, Julius P. Witmark Sec'y.  
Ernest R. Ball.

In presence of: Henry Hart, Notary Public 47, N. Y. Co.

[fol. 36] EXHIBIT "B", TO COMPLAINT

Agreement made this 1<sup>st</sup> day of July, 1910, by and between M. Witmark & Sons, doing business in the Borough of Manhattan, City of New York, party of the first part, and George Graff, Jr., author, of the Borough of Manhattan, City of New York, party of the second part:

Whereas, the party of the first part is desirous of acquiring the copyright of and property in all the musical compositions which the party of the second part may write or compose, alone or in conjunction with others, or secure control of during the period of five (5) years from the date hereof;

Now, in consideration of the sum of One Dollar by each of the parties hereto to the other in hand paid, the receipt whereof is hereby reciprocally acknowledged, and also in consideration of the covenants and conditions hereinafter contained,

This Agreement Witnesseth:

First: The party of the second part does hereby covenant and agree to deliver to the party of the first part any and all musical compositions which the party of the second part, alone or in conjunction with others, may write or compose or acquire control of during the period of five (5) years, beginning from the date of this agreement, and the said party of the second part hereby expressly covenants

and agrees that any and all musical compositions which said party of the second part may or shall write or compose or acquire control of during the period of five (5) years beginning from the date of this agreement, including the titles, words and music of any and all such musical compositions, shall, immediately upon the same being written or composed or control thereof being secured, become and be the sole and absolute property of the party of the first part; and the party of the second part hereby expressly grants and conveys to the party of the first part the copyright or copyrights of, with renewals and with right to copyright and renew, and property in any and all musical compositions which he may write or compose or acquire control of during the said period of five (5) years, including the titles, words and music thereof. And said party of the second part covenants and agrees not to write, compose for or deliver to any person, firm or corporation other than the party of the first part, any musical composition at any time during the period of five (5) years beginning from the date of this agreement, or the titles, words or music of any such composition or any part thereof, and he will not permit any publisher, person, firm or corporation other than the party of the first part to publish or in any manner use any such composition, title, words or music of any part thereof.

Second. The party of the second part hereby declares and covenants that he is entirely free and has good right to make this agreement; that he has not entered into any contract or agreement of any description which prevents him or could prevent him from carrying out in full the purposes of this contract. And the said party of the second part further covenants and agrees to protect and defend the right, title and interest of M. Witmark & Sons to the fullest extent of any composition or compositions which the said M. Witmark & Sons may acquire from the party of the second part.

Third. The party of the second part agrees that during each year of the term of this agreement, he will submit to the party of the first part for publication, all the new and original compositions written and composed by him, alone or in conjunction with others, or controlled by him, but not less than six (6) compositions each year.

The party of the first part agrees to publish not less than three (3) of the compositions acquired from the party of the second part during each year of the term of this agreement. It is fully understood and agreed that complete works, such as comic operas, musical comedies, or groups of numbers that may be written for either, and cycles, are to be considered as single compositions.

Fourth. The party of the first part agrees to pay to the party of the second part as royalty the sum of four (4¢) cents when he furnishes both words and music, and the sum of two (2¢) cents when he furnishes either the words or music only, upon each and every copy sold by it of any "standard" and "operatic" numbers which the party of the second part shall have written, composed or acquired control of either alone or in conjunction with others; and the sum of three (3¢) cents when he furnishes both words and music, and the sum of one and one-half (1½¢) cents when he furnishes either the words or music only, upon each and every copy sold by it at the regular rate, of any "popular" number which the party of the second part shall have written, composed or acquired control of either alone or in conjunction with others. However, upon copies of "popular" numbers sold by the party of the first part at less than the regular rate down to ten cents, the party of the second part will accept as royalty the sum of one and one-half (1½¢) cents per copy, provided he has supplied both the words and music, and the sum of three-fourth (¾¢) cents per copy if he has supplied either the words or music only; and upon copies sold at less than ten cents the party of the second part will accept as royalty the sum of one (1¢) cent per copy if he has supplied [fol: 39] both the words and music, and the sum of one-half (½¢) cent if he has supplied either the words or music only. It is fully understood that no royalties shall be paid upon arrangements of any kind and that no royalty shall be paid upon copies disposed of as "new issues"; also that a sum equal to one-half of the above-mentioned royalties is to be paid upon copies sold by the party of the first part in foreign countries.

The said party of the second part hereby assigns, transfers sets over, sells and conveys to the party of the first part all mechanical rights in any composition which the said party of the second part has heretofore written or

composed either alone or jointly with others or in which he has, either alone or jointly with others, acquired mechanical rights, and in any compositions which he, the said party of the second part may hereafter either alone or in conjunction with others write or compose during the life of this agreement; or in which he may, either alone or jointly with others, acquire mechanical rights during the life of this agreement; and the said party of the first part hereby agrees to collect such royalties as may accrue from the mechanical reproduction of the compositions of the party of the second part and to pay to the party of the second part, for himself and all others who may jointly be interested with him, one-half of all moneys received by the party of the first part from or on account of such mechanical rights.

Fifth. The party of the first part hereby further agrees that it will render unto said party of the second part, semi-annual statements on the 15th days of January and July of each year, showing all sales and royalties earned by said party of the second part, and any moneys which at any time may appear from such statements to be due shall be paid to the party of the second part within thirty days thereafter.

[fol. 40] Sixth. On the expiration of this agreement the party of the second part will renew this agreement for a further term of five (5) years upon the same terms and conditions as set forth and provided for in this agreement, provided that the said party of the first part shall at least six (6) months before the expiration of this agreement notify said party of the second part in writing of its intention to renew this agreement.

In Witness Whereof the parties hereto have hereunto executed this agreement in duplicate the day and year first above written.

In the presence of: (Signature not legible.)

(Signature not legible.) L. S. (Signature not legible.) L. S.

## EXHIBIT "C", TO COMPLAINT

M. Witmark &amp; Sons, New York, N. Y.

Title of music: When Irish Eyes Are Smiling

Lyric by Chauncey Olcott and Geo. Graff, Jr.

Music by Ernest Ball

Date of publication Aug. 12, 1912. Copies received Aug. 14, 1912.

Entry: Class E. XXe., No. 292131. Thorvald Solberg, Register of Copyrights. (Seal.)

[fol. 41]

E1

Copyright Office of the United States of America

Library of Congress—Washington

## Certificate of Copyright Registration

This is to certify, in conformity with section 55 of the Act to Amend and Consolidate the Acts respecting Copyright approved March 4, 1909, that two copies of the MUSICAL COMPOSITION named herein have been deposited in this Office under the provisions of the said Act, and that registration for copyright for the first term of 28 years from the date of publication thereof has been duly made in the name of

(Seal.)

## EXHIBIT "D", TO COMPLAINT

For and in consideration of the sum of Sixteen Hundred (\$1600.00) Dollars, to me in hand paid, receipt of which is hereby acknowledged, I do hereby sell, assign, transfer and deliver to M. Witmark & Sons, hereinafter designated as the Publisher, all my rights, title, interest and royalties in and to my lyrics and musical compositions that are published by it; also all rights, title and interest in and to all my lyrics and musical compositions that they have contracted for and which may be unpublished, including the following:

While Rivers of Love

Come To Me

Love Wins Always

[fol. 42] Homeward Bound  
 Until Life Shall Be Done  
 'Tis I, My Love Who Dreams  
 Give Praise In Gladsome Song  
 'Twas Night Before Xmas  
 Calling of the Sea  
 When Irish Eyes Are Smiling  
 I Love The Name Of Mary  
 Lost Melody  
 Shine Oh, Holy Light  
 Let Us Have Peace  
 Baby of the Lagoon  
 Little Chief of Seven Moons  
 Little Fur Baby  
 My Wee My Bonnie Bairn  
 My Little Pickinny  
 Sleep Little Angel Sleep  
 My Little Maid of Tokio  
 Why That Tear  
 Cradle Song  
 I'd Love To Be Loved By A Girl  
 Keep All Your Love For Me  
 Yankee Girl Is Queen Of All  
 As Long As The World Rolls On  
 Farming Up to date  
 When I Hear Those Dear Old Southern Songs  
 Isle O' Dreams  
 Where Is Love Of Yesterday  
 Across The Rio Grande  
 Angel of Light Lead On  
 Honey Don't You Know  
 Roll On Oh Beautiful World  
 Tale Of An Orange Blossom  
 All The World Loves A Lover  
 My Baby Boy

[fol. 43] I Come To Thee  
 In A Little While  
 Here's Love and Success  
 While The Church Bells Are Chiming  
 My Sweet  
 'Till The Sands of the Desert Grow Cold  
 Teach Me To Pray  
 Vain Is My Strength

True Heart  
 Would You Care To Do That  
 'Till We Meet Again  
 Yankee Flyer  
 Oh The Circus  
 Three Simple Words "I Love You"  
 If you'll Remember Me  
 To The End of the World  
 Star of Heaven  
 I Do Believe  
 Sugar Rose  
 Roses O' Mine  
 I'll Change The Shadows  
 I Never Met Before A Girl Like You  
 Me Little Ludeen  
 Good-bye My Love  
 In Dreams My Own  
 I Want A Home For My Heart  
 Sleep Little Angel Sleep  
 Sonny  
 The Frolic of the Leaves  
 Daddy Was A Grand Old Man  
 Isle O' Dreams

to have and to hold the same absolutely unto the said Publisher, its successor, successors and assigns, together with all rights there in for all countries, including the publishing rights, the performing and cinematograph rights, the right of reproduction upon mechanical instruments of every description, the right to make, publish and perform any arrangement or adaption of the same, and all copyrights and renewals of copyrights and the right to secure all copyrights and renewals of copyrights in the same or in any arrangements or adaptations thereof, and any and all rights therein that I or my heirs, executors, administrators or next of kin may at any time be entitled to.

And I do, for myself, my heirs, executors, administrators and next of kin, hereby irrevocably authorize and appoint the Publisher, its successor, successors and assigns, my attorneys and representatives, in my name or in the names of my heirs, executors, administrators and next of kin, or in its own names to take and do such actions, deeds and things, and make, sign execute and acknowledge all such documents as may from time to time be necessary to

secure to the Publisher, its successor, successors and assigns, the renewals and extensions of the copyrights in said compositions and all rights therein for the terms of such renewals and extensions. And I agree, for myself any for my heirs, executors, administrators and next of kin, upon the expiration of the first term of any copyright in said compositions, in this or in any other country, to duly make, execute, acknowledge and deliver or to procure the due execution, acknowledgement and delivery to the Publisher, its successor successors or assigns, of all papers necessary in order to secure to it the renewals and extensions of all copyrights in said compositions and all rights therein for the terms of such renewals and extensions.

And I do hereby covenant and warrant that said compositions are original work, that no part thereof is in the public domain; that I am the sole owner of said compositions and of all the rights therein, and have not sold, assigned, set over, hypothecated or mortgaged any right, title or interest in or to said compositions, or any part thereof, and that I have not entered into any contract with any party whomsoever, affecting said compositions or any right, title or interest therein, but have full right to make this present instrument and sale.

I further covenant and agree to protect and defend the right, title and interest of the said Publisher, and its successors and assigns in the compositions hereby sold to the fullest extent.

In Witness Whereof I have hereunto subscribed my name and affixed my seal at N. Y., in the State of N. Y. this 19 day of May, 1917.

Geo. Graff, Jr. (L. S.)

In presence of: O. H. Jordan

STATE OF ——

County of ——, ss.

On this — day of May, 1917, before me personally came George Graff, Jr., to me known and known to me to be the person mentioned and described in the foregoing instrument, and who executed the same, and he duly acknowledged to me that he executed the same for the uses, intents and purposes therein mentioned.

[fol. 46] Copyright Office of the United States of America  
Library of Congress—Washington

The foregoing assignment of copyright, dated May 19, 1917, and received for record in the Copyright Office on November 19, 1935, has been recorded in the Copyright Office book 349, pages 217-219, in conformity with the laws of the United States respecting copyrights.

In Witness Whereof, the seal of this Office has been hereto affixed this twenty-first day of November, 1935.

Wm. L. Brown, Register of Copyrights. (Seal.)

EXHIBIT "E," TO COMPLAINT

The copyright is claimed by one of the authors of words, and the widow of the other author of words.

The work is described as a Musical Composition and is entitled When Irish Eyes Are Smiling Lyric by Cuauney Oleott and Geo. Graff, Jr. Music by Ernest R. Ball.

The date of original publication was Aug. 12, 1912.

Entry No. Exxu 292131.

Application filed Aug. 12, 1939. Renewal registration No. 78644.

C. L. Bouvé, Register of Copyrights. (Seal.)

[fol. 47] Library of Congress—Washington

Copyright Office of the United States of America

Certificate of Copyright Registration

This is to certify, that in conformity with section 23 of the Act to Amend and Consolidate the Acts respecting Copyright approved March 4, 1909, an application for the renewal of the Copyright now subsisting in the work named herein for the term of 28 years has been duly registered in the name of George Graff, Flushing, L. I., N. Y., and Margaret O'Donovan Oleott, New York, N. Y.

EXHIBIT "F," TO COMPLAINT

Assignment of Copyright

Vol. 422, Page 150.

Know all men by these presents, for and in consideration of the sum of One Dollar (\$1.00) and other good and

valuable considerations, to me in hand paid, receipt of which is hereby acknowledged, I, George Graff, by my appointed attorney M. Witmark & Sons, do hereby sell, assign, transfer and set over unto M. Witmark & Sons, its successors and assigns, the renewal copyright of the composition entitled:

"When Irish Eyes Are Smiling"

In Witness Whereof, I have hereunto set my hand and seal this 12th day of August, 1939.

George Graff, by M. Witmark & Sons, by A. M. Wattenberg, Assistant Secretary.

[fol. 48] STATE OF NEW YORK,

County of New York, ss.:

On this 12th day of August, 1939; before me personally came A. M. Wattenberg, Assistant Secretary of M. Witmark & Sons, to me known and known to me to be the person who executed the foregoing assignment as Assistant Secretary of M. Witmark & Sons, Attorney for George Graff under and by virtue of an instrument in writing, dated the 19th day of May, 1917.

Joseph A. McLaughlin, Notary Public, Kings County,  
No. 160, Certificate filed in N. Y. County No. 247.  
Commission expires March 30, 1941. (Seal.)

Copyright Office of the United States of America

Library of Congress—Washington

The foregoing assignment of copyright, dated August 12, 1939, and received for record in the Copyright Office on August 14, 1939, has been recorded in the Copyright Office, book 422, page 150, in conformity with the laws of the United States respecting copyrights.

In Witness Whereof, the seal of this Office has been hereto affixed this nineteenth day of August, 1939.

C. L. Bouvé, Register of Copyrights. (Seal.)

[fol. 49] EXHIBIT "G" TO COMPLAINT

Assignment of Copyright

Vol. 423, Page 93.

Know all men by these presents, for and in consideration of the sum of One Dollar (\$1.00) and other good and val-

able considerations, to me — hand paid, receipt of which is hereby acknowledged, I, Margaret O'Donovan Olcott (widow of Chauncey Olcott), do hereby sell, assign, transfer and set over unto M. Witmark & Sons, its successors and assigns, the renewal copyright of the following compositions:

“When Irish Eyes Are Smiling”

“The Calling Of The Sea”

In Witness Whereof, I have hereunto set my hand and seal this 28th day of August, 1939.

Margaret O'Donovan Olcott,

In the presence of: — — —

Copyright Office of the United States of America

Library of Congress—Washington

The foregoing assignment of copyright, dated August 28, 1939, and received for record in the Copyright Office on [fol. 50] August 29, 1939, has been recorded in the Copyright Office, book 423, page 93, in conformity with the laws of the United States respecting copyrights.

In Witness Whereof, the seal of this Office has been hereto affixed this sixth day of September, 1939.

C. L. Bouyé, Register of Copyrights. (Seal)

EXHIBIT “H,” TO COMPLAINT

Copyright Office of the United States of America

Library of Congress, Washington

Certificate of Copyright Registration

This is to certify, in conformity with section 23 of the Act to Amend and Consolidate the Acts respecting Copyright approved March 4, 1909, an application for the renewal of the copyright now subsisting in the work named herein, for the term of twenty-eight years has been duly registered in the name of George Graff whose address is 3301 164 St. Flushing, L. I., N. Y. The renewal copyright is claimed by One of the Authors of Words. The work

is described as a Musical Composition and is entitled When Irish Eyes are Smiling. Lyric by Chauncey Olcott and Geo. Graff, Jr. Music by Ernest R. Ball. The date of publication was August 12, 1912. Entry No. Exxc 292131. The name of the original claimant was M. Witmark & Sons. Renewal registration No. 78706.

Dated August 23, 1939.

C. L. Bouvé, Register of Copyrights. (Seal.)

[fol. 51] EXHIBIT "I," TO COMPLAINT

Vol. 432, Page 123.

In consideration of the sum of \$1.00 and other good and valuable consideration, receipt whereof is hereby acknowledged, I do hereby sell, assign, transfer and set over to Fred Fisher Music Co. Inc., its successors and assigns, all of my right, title and interest in and to renewal copyright number E292131 on the musical composition entitled "When Irish Eyes Are Smiling."

Dated this October 24, 1939.

Geo. Graff.

Ben Schulte, Witness.

EXHIBIT "J," TO COMPLAINT

Copyright Office of the United States of America.

Library of Congress, Washington.

Certificate of Copyright Registration

This is to certify, in conformity with section 23 of the Act to Amend and Consolidate the Acts respecting Copyright approved March 4, 1909, an application for the renewal of the Copyright now subsisting in the work named herein for the term of twenty-eight years has been duly [fol. 52] registered in the name of Maud Lambert Ball, Whose address is 184 West Fourth St., New York, N. Y. The renewal copyright is claimed by the Widow of the Author of Music. The work is described as a Musical Composition and is entitled When Irish Eyes are Smiling. Lyric by Chauncey Olcott & George Graff, Jr. Music by Ernest

R. Ball. The date of publication was August 12, 1912. Entry No. Exce 292131. The name of the original claimant was M. Witmark and Sons. Renewal registration No. 79651. Date November 15, 1939.

C. L. Bouv , Register of Copyrights. (Seal.)

EXHIBIT "K," TO COMPLAINT

Vol. 443, Page 95.

Know all men by these presents, that the undersigned, Maude Lambert Ball, (widow of Ernest R. Ball) residing in New York, N. Y. in consideration of the sum of One (\$1.00) Dollar and other good and valuable consideration, to her in hand paid by Mills Music, Inc., a domestic corporation having its principal place of office at 1619 Broadway, in the Borough of Manhattan, City of New York, herein called the "Purchaser" receipt whereof is hereby acknowledged, hereby assigns to the "Purchaser" all her right, title and interest in and to the musical compositions in detail set out in "*Schedule A*," attached hereto and made part hereof, including all the renewal copyrights thereof secured under the laws now in force and effect in the United States, and including all her interest in and to all copyrights thereof heretofore secured under the laws in force and effect in any other country or countries throughout the world.

And, the said Maude Lambert Ball, in order to induce the said "Purchaser" to accept this assignment and make [fol. 53] this purchase to pay a good and valuable consideration therefor, does hereby represent and warrant to the said "Purchaser" as follows:—

1. That all the said renewal copyrights to all the musical compositions listed in Schedule A are valid and subsisting renewal copyrights in the United States.
2. That she has a right to make this Assignment and sale.
3. That she has not heretofore assigned or pledged or attempted to assign or pledge her interest in and to any of the musical compositions and renewal copyrights thereof listed in Schedule A.

And, Maude Lambert Ball, further agrees upon demand to sign, execute and acknowledge any or all other papers or instruments that may be necessary to effectuate this assignment and sale or carry out the purposes thereof.

In Witness Whereof, Maude Lambert Ball, has hereunto set her hand and seal this 8 day of July, 1940.

Maude Lambert Ball,

STATE OF NEW YORK,

City of New York;

County of New York, ss:

On this 8th day of July, 1940, before me personally appeared Maude Lambert Ball, to me known and known to me to be the individual mentioned and described in the foregoing instrument, and she duly acknowledged to me that she executed the same.

Louis Schwartz, Notary Public, Bronx Co. Clk's No. 162, Reg. No. 211-S-41, Cert. filed in N. Y. C. No. 207, Reg. 4-S-566, Commission expires March 30, 1941. (Seal.)

[fol. 54]

Vol. 433 Page 96

SCHEDULE A TO EXHIBIT "K"

SUGAR ROSE, Words by Jack Kingsley, Music by George Christie (Ernest R. Ball) date of original publication, January 27th, 1913, #Exxe-301486, renewal copyright, June 3rd, 1949, #87352.

M.L.B.

BECAUSE HE DID HIS DUTY, Words by J. Will Callahan, Music by George Christie (Ernest R. Ball) date of original publication, March 3rd, 1913, #Exxe-305166, renewal copyright, June 3rd, 1940, #87354.

M.L.B.

AT THE TEN CENT MOVIE SHOW, Words by Leo J. Curley, Music by George Christie (Ernest R. Ball) date of original publication, March 10th, 1913, #Exxe-305372 renewal copyright, June 3rd, 1940, #87355.

M.L.B.

TO HAVE, TO HOLD, TO LOVE, Lyric by Darl MacBoyle, Music by Ernest R. Ball, date of original publication, Jan-

uary 13th, 1913, #Exxe-301344, renewal copyright, June 3rd, 1940, #87350.

M.L.B.

**MY DAYS ARE IN HIS HANDS**, Text by Fred G. Bowles, Music by Ernest R. Ball, date of original publication, March 31st, 1913, #Exxe-305897, renewal copyright, June 3rd, 1940, #87357.

M.L.B.

**I'LL CHANGE THE SHADOWS TO SUNSHINE**, Words by Geo. Graff, Jr. Music by Ernest R. Ball, date of original publication, March 25th, 1913, #Exxe-305601 renewal copyright, June 3rd, 1940, #87356.

M.L.B.

**I DO BELIEVE**, Lyric by George Graff, Jr; Music by Ernest R. Ball, with Violin obligato, date of original publication, March 3rd, 1913, #Exxe-305164, renewal copyright, June 3rd, 1940, #87353.

M.L.B.

**MY EVENING SHRINE**, Lyric by Arthur Angyalfi, Music by Ernest R. Ball, date of original publication, September 4th, 1912, #Exxe-293151, renewal copyright November 15th, 1939, #79653.

M.L.B.

**ON A GOOD OLD TIME STRAW RIDE**, Lyric by Dave Reed, Music by Georgie Christie (Ernest R. Ball) date of original publication, July 12th, 1912, #Exxe-288925 renewal copyright, November 15th, 1939, #79650.

M.L.B.

**WHEN IRISH EYES ARE SMILING**, Lyric by Chauncey Oleott & George Graff, Jr. Music by Ernest R. Ball, date of original publication August 12th, 1912, #Exxe-292131, renewal copyright, November 15th, 1939, #79651.

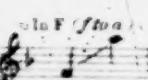
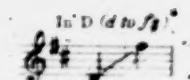
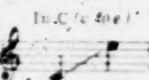
M.L.B.

**THE ISLE OF AFTERWHILE**, Lyric by Gulielma D. Orr, music by Ernest R. Ball, date of original publication, January 13th, 1913, #Exxe-301361, renewal copyright, June 3rd, 1940, #87351.

M.L.B.



# WHEN IRISH EYES ARE SMILING



SUNG BY  
Mr. CHAUNCEY OLCOTT



Soprano or  
Tenor (d re mi)  
and  
Alto or Baritone  
(f do re)

Soprano or  
Tenor (d re mi)  
and  
Alto or  
Baritone (f do re)



LYRIC BY

CHAUNCEY OLCOTT AND GEO. GRAFF JR.

MUSIC BY

ERNEST R. BALL

SOLO 50¢

DUET 60¢

The following are the available choral arrangements

SSA 15¢

SSAA 16¢

SATB 16¢

TTBB 15¢



OPERATIC

M. WITMARK & SONS,  
NEW YORK  
PRINTED IN U.S.A.

## Some of the GREAT Songs

by

## VICTOR HERBERT

## TRAMPI TRAMPI TRAMPI!

Lyric by RIDA JOHNSON YOUNG



Copyright 1911 by M. Witmark &amp; Sons

VOCAL: Solo—E♭, 50c

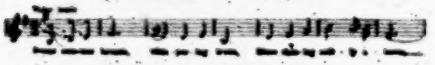
CHORAL: TTBB, 16c

SYMPHONY BAND: "A" band, \$4.00; "B" band, \$3.00; "C" band, \$2.00; Extra parts, 20c each

Easy piano solo arrangement, 50c

## KISS' ME AGAIN

Lyric by HENRY BLOSSOM



Copyright 1911 by M. Witmark &amp; Sons

VOCAL: Solos—F, G, A, B♭, 50c ea.

DUETS: A, 60c

CHORAL: SSA, 18c; SATB, 16c; TTBB, 20c

SYMPHONY BAND: "A" Band, \$4.00; "B" Band, \$3.00; "C" Band, \$2.00; Condensed Score, 75c; Extra Parts, 20c ea.

INSTRUMENTAL: Violin and Piano, 60c; Cello and Piano, 60c; Violin, Cello and Piano, 75c; B♭ Sax. and Piano, 60c; B♭ Alto Sax. or Clarinet and Piano, 60c; B♭ Trumpet and Piano, 60c; B♭ Clarinet and Piano, 60c; C Sax. and Piano, 60c; Corner or Trombone and Piano, 75c; Piano Solo (Waltz), 50c

## MARCH OF THE TOYS



Copyright 1911 by M. Witmark &amp; Sons

PIANO: Solo, 50c; 4 Hands (Two Pianos), 31.25

CHORAL: SSA, 25c; TTBB, 35c

BAND: Standard Band, \$2.00

ORCHESTRA: S.O., \$1.50; F.O., \$2.00

M. WITMARK &amp; SONS

## TOYLAND

Lyric by GLEN MACDONOUGH



Copyright 1911 by M. Witmark &amp; Sons

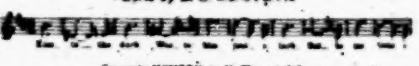
VOCAL: Solo—F, 50c

CHORAL: SA, 15c; SSAA, 25c

Easy piano solo arrangement, 50c

## A KISS IN THE DARK

Lyric by B.G. DESYLA



Copyright 1911 by M. Witmark &amp; Sons

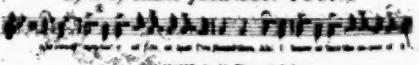
VOCAL: Solo—C, D, E♭, 50c ea.

DUETS: E♭, C, 60c ea.

CHORAL: SATB, 16c; TTBB, 16c

## AH! SWEET MYSTERY OF LIFE

Lyric by RIDA JOHNSON YOUNG



Copyright 1911 by M. Witmark &amp; Sons

VOCAL: Solo—A♭, B♭, C, D, 50c ea.

DUETS: B♭, D, 60c ea.

CHORAL: SA, W-2160, 15c; SSA, W-2161, 15c; SSAA, 18c; TBB, 16c; SAB, 15c; SATB, 16c; TTBB, 16c

INSTRUMENTAL: Violin and Piano, 60c; Cello and Piano, 60c; Violin, Cello and Piano, 75c; Piano Solo, 50c

## ROSE OF THE WORLD

Lyric by GLEN MACDONOUGH



Copyright 1911 by M. Witmark &amp; Sons

VOCAL: Solo—G, 50c

# When Irish Eyes Are Smiling

Lyric by  
CHAUNCY OLcott  
& GEO. GRAFF Jr.

Valse moderato espressive

Music by  
ERNEST R. BALL

The musical score consists of four staves of music. The top two staves are for the piano, showing chords and bass notes. The bottom two staves are for the voice, with lyrics printed below the notes. The vocal part is in common time, while the piano part is in 2/4 time. The lyrics are as follows:

There's a tear in your eye, And I'm won-der-ing why, For it  
For your smile is a part, Of the love in your heart, And it

p a tempo

nev-er should be there at all. With such pow'r in, your smile, Sure a  
makes e-ven sun-shine more bright. Like the lin-nets sweet song, Croon-ing

stone you'd be - guile, So there's nev-er a tear-drop should fall. When your  
all the day long, Comes your laugh-ter so- ten-der and light. For the

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Copyright Renewed  
International Copyright Secured

5772  
MUSICAL JEWELRY

sweet lilt-ing O laugh-ter's-like some fair - y song, And your eyes twinkle  
spring-time of life is the sweet-est of all, There is ne'er a re

bright as can be; You should laugh all the white and all  
care or re gret; And while spring-time is ours through-out

oth - er times, smile, And now smile a smile for me.  
half of youth's hours. Let us smile each chance we get.

CHORUS  
When I - rish eyes are smi - ling, Sure it's like a morn - in'

Spring. — In the lift - of I - rish - laugh - ter, You can hear the  
 an - gels sing. When I - rish hearts are hap - py, All the  
 world seems bright and gay, And when I - rish eyes are smi -  
 ling, Sure they steal your heart a - way. When way.

# • FAMOUS IRISH SONGS •

## MOTHER MACHREE



- A Little Bit Of Heaven, Sure They Call It Ireland.
- My Wild Irish Rose
- Mother Machree
- Too' Ra Loo Ra Loo Ra
- Where The River Shannon Flows

- At The End Of An Irish Lane
- Bells Of Killarney
- Colleen O' My Heart
- That Old Irish Mother Of Mine
- That's How The Shannon Flows

M. WITMARK & SONS  
NEW YORK

## MY WILD IRISH ROSE



## Exhibit "M" to Complaint

# WHEN IRISH EYES ARE SMILING

Now Arranged in Fox-Trot Rhythm

"When Irish Eyes Are Smiling" belongs for all time to the folk-lore of Ireland. Yet it was in this country, and less than thirty years ago that George Graff wrote his lovely poem.

Later Ernest Ball touched it with the magic of music giving it a simple melody that matched the inspiration of the poet.

Chauncey Olcott sang it for a year or two and then having lived its hour it seemed destined to be forgotten.

But a Dublin minstrel, returning to his native isle—where Irish eyes so often smile thru burning tears—took the song with him. It echoed so fully the lovable characteristics of that courageous, romantic race the people of Ireland took it to their hearts and made it their own. Irish mothers sang it to their babies, sweethearts to their colleens—patriots to their heroic wives.

And whenever Erin's sons and daughters left the homeland—they carried their song with them—in their hearts and on their lips—and soon every corner of the earth knew and sang the glory of smiling Irish eyes.

So it came back to the land of its birth to take its place among the world's immortal ballads.

In a long career as writer and publisher I have issued many famous songs but I am most proud of the privilege that is mine to-day: To publish the greatest of all Irish songs—"When Irish Eyes Are Smiling."

*Fred Fisher*

**Fred Fisher Music Co., Inc.**  
1619 Broadway  
New York City

WORKING

PROFESSIONAL COPY

This copy is intended for the use of PROFESSIONAL SINGERS ONLY and may  
not be sold or be exchanged for less than its value to those who buy or acquire it  
privately and will be presented under the copyright law by the publishers.

# When Irish Eyes Are Smiling

Fox Trot

GEORGE GRAFF Jr.  
CHAuncey Olcott  
and ERNEST R. HALL

Fast



VERSE

There's a tear in your eye, And I'm won-dering why, For it  
For your smile is a part. Of the love in your heart. And in

new or should be there at all.  
makes even sun shine more bright  
With such like the

now in your smile. Sure as strong you be quiet. So there's  
I'm nets never song. Croon rag all the day long. Comes you

Copyright 1912 by M. Witmark & Sons  
International Copyright Secured. Rev. and Revised Copyrighted 1940 by Fred Fisher Music Co. Inc.  
All Rights Reserved, including the right of public performance for profit

Made in U.S.A.

never a tear-drop should fall.  
laugh-ter so ten-der and light.

When your sweet zill - ly  
For the spring-time of

Am G C Am C G

laugh-ter is like some fair-y song. And your eyes twink-le bright as can  
life is the sweet-est of all. There is neer a real care or re-

C7

be-  
greet. You should laugh all the while and all oth-er times, smile,  
And while spring-time is ours through-out all of youth's hours.

C7 Am G

And now smile a while for me.  
let us smile each chance we get.

D7 G

When Irish Eyes Are Smiling 3

CHORUS

When I RISH EYES ARE SMILING Sure it's like a morn in

spring. In the light of Irish laughter. You can hear the

an gein sing. When I Irish hearts are happy. All the

world seems bright and gay. And WHEN I RISH EYES ARE SMILING.

Sure they steal your heart away. WHEN way

When Irish Eyes Are Smiling

[fol. 60] IN DISTRICT COURT OF THE UNITED STATES

AFFIDAVIT OF GEORGE GRAFF, JR., IN OPPOSITION TO MOTION

STATE OF NEW YORK/

County of New York, ss.:

GEORGE GRAFF, JR., being duly sworn, deposes and says:

I am one of the defendants in the above entitled action, and one of the authors of "When Irish Eyes Are Smiling," the song involved in the instant case.

This affidavit is submitted in opposition to plaintiff's motion for an injunction pendente lite to restrain the Fred Fisher Music Co., Inc., and myself from printing, publishing, copying or vending, or from making any use whatsoever of the song "When Irish Eyes Are Smiling."

I do not deny that on July 1, 1910, I entered into the agreement with the plaintiff, a copy of which is annexed to the complaint marked Exhibit "B".

In 1912, while my agreement with the plaintiff was in force, I, together with one Chauncey Olcott and one Ernest R. Ball, jointly composed the musical composition entitled "When Irish Eyes Are Smiling", the music thereof having been written by Mr. Ball and the lyrics thereof by Mr. Olcott and myself.

During the early part of 1917 I was in desperate financial straits. I stated to the plaintiff that I would be willing to release it from its obligation to pay me royalties on "When Irish Eyes Are Smiling" as well as on many other songs of mine which it was then publishing, in consideration of a lump sum payment in cash.

[fol. 61] At this time I had approximately seventy songs with the plaintiff and my royalties from these songs had amounted in previous years to as much as \$5000. annually. On May 19, 1917, I entered into an agreement with plaintiff, copy of which is annexed to the complaint herein and marked Exhibit "D". In this agreement I released the plaintiff from the obligation to pay any further royalties on a group of some seventy songs. In return I received a lump sum payment of \$1600. The copyrights on many of these songs had been secured just prior to 1917 and the plaintiff, therefore, was released from the duty to pay royalties thereon for a period of over twenty-five years thereafter. Among these seventy songs were included certain com-

positions which have now become world famous. Among these were "When Irish Eyes Are Smiling," "Till The Sands Of The Desert Grow Cold," "I Love The Name Of Mary," "As Long As The World Rolls On," "All The World Loves A Lover," "I Come To Thee," "Teach Me To Pray," "To The End Of The World With You," "Goodbye, My Love, Goodbye," and many others.

Naturally, the agreement of May 19, 1917, as well as the agreement of July 1, 1910, speak for themselves. I do wish to point out, however, that at the time these agreements were executed, neither the plaintiff nor I had any discussion regarding the disposal of my renewal copyrights.

In the year 1939, the question of the ownership of the renewal copyrights of some of my most important songs arose for the first time. The right to file application for a renewal copyright of "When Irish Eyes Are Smiling" came into being on August 19, 1939.

At this time I was advised by counsel that the renewal copyright to this song could only be obtained by me as [fol. 62], author and that this right was inalienable prior to the time when application for the renewal copyright could be filed. I was advised that the language contained in the agreements of July 1, 1910 and May 19, 1917 was ineffective to transfer any interest in my renewal copyrights.

I notified the plaintiff that I intended to make a new bargain with respect to my renewal copyright of "Irish Eyes", and I notified the plaintiff that it did not have any rights in the renewal copyright by virtue of its previous agreements with me.

I thereupon made a contract with the defendant, Fred Fisher Music Co., Inc., for the exploitation of the renewal copyright of the song. All of the facts regarding my prior agreements with the plaintiff were fully disclosed to the Fisher Company.

I believe it important on the present motion to refer briefly to some of the significant changes which have taken place in the music industry since "When Irish Eyes Are Smiling" was first copyrighted. These facts graphically illustrate the importance of the renewal copyright to the author.

In 1912, when the song was written and first published, the principal income to song writers from the exploitation of their work came from sheet music and phonograph records. For this reason, contracts dealing with the ex-

loitation of songs dealt almost exclusively with these two main sources of revenue.

Since 1912, however, the invention of the radio, the talking motion picture, and of other mechanical devices for the production of music have materially changed the conditions under which music is exploited. As a result of these changed conditions, authors are now entitled to receive revenues from new sources by virtue of new uses of their music and contracts made for the exploitation of music in [fol. 63] 1912 are not longer applicable to the changed conditions of today.

For example, the licensing of synchronization rights of music for use in sound motion pictures results in a net revenue to song writers and publishers of approximately \$500,000 per year. This source of revenue only came into existence in 1927.

At the present time, music is electrically transcribed for broadcasting and other purposes. This use of music only originated in 1932 and since that date has yielded a net revenue to authors and publishers of approximately \$150,000 a year.

Income to song writers and publishers from radio broadcasting of popular music, as reflected in payments made to the American Society of Composers, Authors & Publishers, which was not in existence in 1912, amounts to over \$1,000,000 annually.

At this very moment, there is considerable discussion in the music industry about a totally new use for popular music called "Phonovision". This new method of exploitation contemplates the use of popular music in connection with small individual strips of film which are to be played in coin operated machines to be installed in bars, restaurants, dance halls and other places of popular music.

It is estimated that the revenue from this new source alone will run into many millions of dollars annually.

Not only have there been a great many new uses, with their attendant new sources of revenue to song writers, but the old uses, which were in existence in 1912, have become very much less important. For example, in 1912 and for a considerable time thereafter, a normal "hit" song sold at least 1,000,000 copies of sheet music. At the present time, even the very biggest hits will only sell about 50,000 copies of sheet music. Similarly, in 1912, the annual income to [fol. 64] song writers and publishers from the sale of

phonograph records was in the neighborhood of \$2,000,000. At the present time, this income is only about \$750,000.

Under the terms of my original publishing agreement with the plaintiff executed in 1912, I have no control over the exploitation of my song in connection with these uses, nor is there any definite provision covering the payment of royalties for the use of my music by these new methods. In brief, neither the plaintiff nor myself ever contracted with respect to these new uses.

The coming into being of renewal copyright, however, gives me the opportunity of making a new bargain for my song in the light of these new developments as well as in the light of the present intrinsic value of the song, which was obviously unknown at the time when it was first published.

Finally, I should like to point out that if I am deprived of the right to make a new bargain with respect to my renewal copyright I will lose not only the opportunity to take advantage of the new uses for music which have come into existence, but also I will not receive a single cent of royalties during the twenty-eight years of the renewal term. The agreement of May 19, 1917, if effective to transfer my renewal copyright to the plaintiff, would also transfer with it the right to receive any royalties during the renewal term.

I believe that as a matter of law I had the right to secure a renewal copyright and the right to thereupon assign it to the defendant, Fred Fisher Music Co., Inc. It may well be that the plaintiff is likewise entitled to publish the song at the present time as the assignee of Margaret O'Donovan Olcott, the widow, of my co-author, Chauncey Olcott. The application, however, for an injunction pendente lite should [fol. 65] be denied, since irrespective of the plaintiff's right to publish the song the defendant, Fred Fisher Music Co., Inc., likewise has that right as the assignee of my renewal copyright.

Geo. Graff, Jr.

Sworn to before me this 5th day of December, 1940,  
 Morris Shilensky, Notary Public, Kings County,  
 Kings Co. Clks. No. 294, Reg. No. 2311, N.Y. Co.  
 Clks. No. 1348, Reg. No. 2 S 817. Commission  
 expires March 30, 1942.

[fol. 66] IN DISTRICT COURT OF THE UNITED STATES

AFFIDAVIT OF JOHN SCHULMAN, IN OPPOSITION TO MOTION  
STATE OF NEW YORK,

County of New York, ss.:

JOHN SCHULMAN, being duly sworn, deposes and says:

I am an attorney at law and a member of the firm of Hays, St. John, Abramson & Schulman, attorneys for the defendants, Fred Fisher Music Co., Inc. and George Graff, Jr., in the above entitled action.

This affidavit is submitted in opposition to plaintiff's motion for an injunction pendente lite.

Prior to July, 1938, Mr. Graff consulted me with regard to the status of the renewal copyrights of songs which he had written, which songs were then being published by the plaintiff;

There being some question regarding agreements made with the plaintiff, I advised Mr. Graff that it was my opinion that so-called assignments or agreements to transfer renewal copyrights made by an author in advance of the time when he might make application for such renewal copyrights were ineffectual as a matter of law.

At Mr. Graff's request, I communicated with A. M. Wattenberg, Esq., an attorney representing the plaintiff. I informed Mr. Wattenberg of the position that I had advised Mr. Graff to take. Incidentally, Mr. Wattenberg is familiar with my view of the law, as we have had a number of discussions on this point.

[fol. 67]. I stated to Mr. Wattenberg that Mr. Graff would be willing to negotiate with the plaintiff for his renewal rights. Mr. Wattenberg, however, took the position that the plaintiff already owned Mr. Graff's renewal copyrights and that Mr. Graff had nothing further to convey.

The various conversations which took place between Mr. Wattenberg and myself were confirmed by correspondence. Copies of letters so exchanged are annexed to this affidavit, marked Exhibits "A" to "D", respectively.

John Schulman.

Sworn to before me this 5th day of December, 1940.

Frederick Griffin, Notary Public, New York  
County, N. Y. Co. Clks. No. 346 Reg. No. 2G351.  
Kings Co. Clks. No. 169 Reg. No. 2254. Bronx Co.  
Clks. No. 45 Reg. No. 186G42. Queens Co. Clks.  
No. 811 Reg. 2523. Commission expires March 30,  
1942.

## EXHIBIT "A", ANNEXED TO AFFIDAVIT OF JOHN SCHULMAN

July 1, 1938.

A. M. Wattenberg, Esq., 551 Fifth Avenue, New York City.

MY DEAR MR. WATTENBERG:

As I told you over the telephone, I have been consulted by George Graff regarding some of his songs which are coming up for renewal of copyright. In this connection, [fol. 68] I understand that there were some contracts with Witmark, of which I should like to have copies.

I should appreciate hearing from you as soon as possible.

Sincerely yours, (Signed) John Schulman.

JS:GS.

## EXHIBIT "B", ANNEXED TO AFFIDAVIT OF JOHN SCHULMAN

October 18, 1938.

A. M. Wattenberg, Esq., 551 Fifth Avenue, New York City.

DEAR WATTY:

You will remember that I spoke to you about George Graff.

The compositions involved are those mentioned in the assignment of copyright dated May 19, 1917, a copy of which you sent me last July.

I should like to know if there is any possibility of coming to some agreement on his claim.

Sincerely yours, (Signed) John Schulman.

JS:GS.

## [fol. 69] EXHIBIT "C", ANNEXED TO AFFIDAVIT OF JOHN SCHULMAN

October 19th, 1938.

John Schulman, Esq., 120 Broadway, New York City.

DEAR JOHN:

This is to acknowledge receipt of yours of October 18th, in re; George Graff.

Will you please let me know explicitly what the claim of your client is. With that before me, I will be able to give it proper consideration.

With kindest regards,

Sincerely, (Signed) Watty, A. M. Wattenberg.

AMW:PB.

[fol. 70] EXHIBIT "D" ANNEXED TO AFFIDAVIT OF JOHN SCHULMAN

October 21, 1938.

A. M. Wattenberg, Esq., 551 Fifth Avenue, New York City.

DEAR WATTY:

I have your letter of the nineteenth in regard to George Graff.

Graff's claim is simply that under the Copyright Law the renewal rights in his compositions revert to him, and that any continued exploitation by your client is in derogation of his rights.

I should like to know whether your client is interested in making some arrangement with Graff.

Sincerely yours, (Signed) John Schulman.

JS:GS.

[fol. 71] IN DISTRICT COURT OF THE UNITED STATES

REPLY AFFIDAVIT OF HERMAN STARR, IN SUPPORT OF MOTION

STATE OF NEW YORK,

County of New York, ss:

Herman Starr, being duly sworn, deposes and says: I am the President of M. Witmark & Sons, plaintiff herein, having executed the affidavit herein verified October 18th, 1940.

The present affidavit is in reply to the affidavit of defendant George Graff verified December 5th, 1940.

Defendant Graff states in his affidavit that during the early part of 1917, he was "in desperate financial straits". It is apparent that the construction which he now seeks to place on the renewal provisions of the copyright statute would certainly, if recognized in 1917, have impeded his

ability to make the May 1917 deal and receive the \$1,600, paid therefor.

The present practice of plaintiff is not to liquidate royalties agreed to be paid to authors by a flat sum, but rather to advance money against royalties to accrue during the original term and renewal term and to take an assignment of the renewal copyright as protection for the advance. Obviously, such transactions would be forbidden, if defendants' desired construction of the renewal provisions of the copyright law were upheld. Thus if defendants' desired construction of the renewal provisions of the copyright statute is upheld, an author, and for that matter the widow of an author dying before the 28th year, would be powerless before the 28th year to raise money by selling the renewal copyright, or by assigning it in consideration of [fol. 72] an advance, regardless of how desperately such person were in need of cash.

Defendant, Graff, states that at the time he executed his general contract of July 1, 1910 and the May, 1917 agreement, no discussion was had regarding the disposition of the renewal rights. He admits, however, that the agreements speak for themselves. I should like to point out, however, that there is no one today associated with the plaintiff corporation who was a part of the management of plaintiff corporation either in 1910 or 1917, and thus we do not know the circumstances under which these agreements were executed. No explanation, however, is necessary since it is apparent from defendant, Graff's own affidavit that it was he and not plaintiff who desired to enter into the May 1917 transaction.

Deponent respectfully submits, therefor, that Graff and defendant Fisher, his present assignee, who took with full notice of Graff's transactions with plaintiff, should be bound by the agreements which Graff voluntarily entered into.

Defendant Graff also points out that since 1917, new arts for the recording or reproduction of music have developed. Deponent would like to reiterate that defendant Graff, being a member of the American Society of Composers, Authors and Publishers, participates in the revenues derived from the said Society from the use of Graff's music over the radio, in night clubs, hotels, cabarets, motion picture theaters and other places of entertainment.

(Sgd.) Herman Starr.

Sworn to before me this 13th day of December, 1940.  
(Sgd.) Joseph A. McLaughlin, Notary Public.  
Certificate filed N. Y. Co. No. 247.

[fol. 73] IN UNITED STATES DISTRICT COURT

FINDINGS OF FACT AND CONCLUSIONS OF LAW—May 26, 1941

Plaintiff herein, lying applied for a preliminary injunction against defendants, Fred Fisher Music Co., Inc. and George Graff, Jr., during the pendency of this action, and said application having come on to be heard, and an opinion herein having been made and rendered by the Court and filed on March 25th, 1941 granting said relief, I do now make the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Plaintiff is a New York corporation.
2. Defendant, Fred Fisher Music Co., Inc. is a New York corporation.
3. Defendant, George Graff, Jr. is a United States citizen and a resident of the Southern District of New York.
4. Plaintiff and defendant, Fred Fisher Music Co., Inc. are engaged in the business of printing, publishing and vending copyrighted musical compositions.
5. Prior to August 12, 1912, Ernest R. Ball, Chatney Olcoty and George Graff, Jr. jointly composed the song entitled "When Irish Eyes Are Smiling", hereinafter referred to as the "Song".
- [fol. 74] 6. At the time said song was thus jointly composed, said Ernest R. Ball and defendant George Graff, Jr. were under contract to plaintiff. Ball's contract with plaintiff is dated January 2, 1908, and is annexed to the complaint as Exhibit A. Defendant Graff's contract with plaintiff is dated July 1, 1910 and is annexed to the complaint as Exhibit B.
7. Under Ball's said contract with plaintiff, Ball covenanted and agreed, for valuable consideration, to deliver

to plaintiff any and all musical compositions which he alone, or in conjunction with others, would compose during the period of five (5) years commencing January 2nd, 1908, and he covenanted and agreed that all musical compositions thus composed by him during said five (5) year period would immediately, upon being composed, become and be the sole and absolute property of plaintiff, and be granted and conveyed to plaintiff.

"the copyright or copyrights of, with renewals and with right to copyright and renew, and property in any and all musical compositions which he may write or compose or acquire control of during said period of five (5) years."

Plaintiff agreed to pay Ball specified royalties.

8. Similarly under defendant Graff's said contract with plaintiff dated July 1, 1910, defendant Graff, covenanted and agreed, for valuable consideration, to deliver to plaintiff any and all compositions which he alone, or in conjunction with others, would compose during the period of five (5) years beginning July 1, 1910, and he covenanted and agreed that any and all musical compositions which he would thus compose during said five (5) year period would [fol. 73] immediately, upon the same being composed, become the sole and absolute property of the plaintiff, and be granted and conveyed to plaintiff.

"the copyright or copyrights of, with renewals and with right to copyright and renew, and property in any and all musical compositions which he may write or compose or acquire control of during the said period of five (5) years."

Plaintiff agreed to pay defendant Graff specified royalties.

9. Oleott, one of the three joint composers of the Song was not under contract to plaintiff, but prior to August 12, 1912, in consideration of the payment of specified royalties, he sold and assigned to plaintiff the Song and the copyright thereof and the right to take out copyright in plaintiff's name.

10. Thereafter and prior to August 12, 1912, pursuant to their respective agreements, Ball, Oleott and defendant Graff delivered the Song to plaintiff.

11. Thereafter, on August 12, 1912, pursuant to plaintiff's said respective contracts with Ball, Oleott and defendant Graff and in conformity with the copyright laws of the United States, plaintiff duly copyrighted the Song.

12. Since copyrighting the Song, plaintiff has published it and each published copy thereof has borne the proper statutory copyright notice.

13. On May 19th, 1917, defendant Graff, by instrument of the same date, for the sum of \$1600, released plaintiff [fol. 76] from any further obligation to pay him royalties for the Song and numerous other songs, and defendant Graff sold, assigned, transferred and delivered to plaintiff all his rights in the Song and other songs,

and all copyrights and renewals of copyrights and the right to secure all copyrights and renewals of copyrights in the same or in any arrangements or adaptations thereof, and any and all rights therein that I may at any time be entitled to.

And I do, for myself hereby irrevocably authorize and appoint the Publisher, its successor, successors and assigns, my attorneys and representatives, in my name to take and do such actions, deeds, and things, and make, sign, execute and acknowledge all such documents as may from time to time be necessary to secure to the Publisher the renewals and extensions of the copyright in said compositions and all rights therein for the term of such renewals and extensions. And I agree, for myself upon the expiration of the first term of any copyright in said composition, in this or in any other country, to duly make, execute, acknowledge and deliver or to procure the due execution, acknowledgment and delivery to the Publisher of all papers necessary in order to secure to it the renewals and extension of all copyrights in said compositions and all rights therein for the terms of such renewals and extensions."

This instrument of May 19, 1917 was duly recorded in the United States Copyright Office on November 19, 1935.

[fol. 77] 14. Defendant Graff is presently alive. His co-composers, Messrs. Ball and Oleott died prior to the beginning of the 28th year of the original copyright and each is presently survived by his respective widow.

15. On August 12, 1939, being within the period fixed by the Copyright Law for registering renewal copyrights, plaintiff, pursuant to defendant Graff's said instrument of May 19, 1917, and pursuant to authority from Olcott's widow, renewed the copyright in the Song in the name of defendant Graff and said Olcott's widow.

16. On August 12, 1939, pursuant to Graff's said instrument of May 19, 1917 plaintiff, as the attorney and representative of Graff, assigned to plaintiff the said renewal copyright in the Song by instrument of the same date, which instrument is annexed to the complaint as Exhibit "F" and which was recorded in the United States Copyright Office on August 12, 1939.

17. Thereafter on August 23, 1939, defendant Graff made personal application to the United States Copyright Office for a renewal registration of the copyright in the Song and by instrument dated October 24, 1939, which is annexed to the complaint as Exhibit "i", defendant Graff purported to assign to defendant Fisher, Graff's purported renewal copyright.

18. At the time defendant Graff executed said instrument of October 24, 1939 to defendant Fisher, both had full knowledge of plaintiff's rights, and of the prior renewal registration of August 12, 1939 in the name of defendant Graff and Olcott's widow, and the prior recorded assignment of that renewal registration of the same date to plaintiff, and the prior recorded instrument between plaintiff and defendant Graff of May 19, 1917.

[fol. 78] 19. Defendant Fisher relying solely and exclusively upon the said purported assignment from defendant Graff by the said instrument dated October 24, 1939 of defendant Graff's purported renewal copyright registration, and without any authority from plaintiff or anyone else other than defendant Graff, has published, offered for sale and sold, and is continuing to publish, offer for sale and sell, copies of the Song; has made an arrangement of the Song, and has offered for sale and sold and is continuing to publish, offer for sale and sell the said arrangement, and has represented to the trade and is representing to the trade that it owns the renewal copyright in the Song and threatens to continue all of the said acts.

20. Plaintiff has notified defendant Fred Fisher Music Co., Inc. in writing that said defendant has infringed the renewal copyright of plaintiff in the Song and that the infringement should cease, but defendant Fred Fisher Music Co., Inc. has continued to do all of the aforesaid acts after receipt of said written notice.

21. Plaintiff has suffered and will continue to suffer irreparable damage by virtue of the acts of defendants Fred Fisher Music Co., Inc. and Graff.

#### CONCLUSIONS OF LAW

1. The original copyright in the Song secured by plaintiff in plaintiff's name on August 12, 1912 was a valid copyright.

2. The renewal copyright in the Song secured by plaintiff on August 12, 1939 in the name of defendant Graff and of Chauncey Oleott's widow was and is a valid renewal copyright.

[fol. 79] 3. The contract between plaintiff and defendant Graff dated July 1, 1910 is a valid and binding agreement in its entirety.

4. The instrument of May 19, 1917 between defendant Graff and plaintiff was and is a valid and binding instrument in its entirety.

5. The assignment of August 12, 1939 by plaintiff, as the attorney and representative of Graff, to plaintiff of the renewal copyright in the Song was and is a valid and binding assignment.

6. The purported renewal copyright registration of the Song on August 23, 1939 by defendant Graff is invalid and void, and is a cloud upon plaintiff's title to and in the renewal copyright of the Song.

7. The purported assignment from defendant Graff to defendant Fisher dated October 24, 1939 of defendant Graff's purported renewal copyright registration in the Song is invalid and void and is a cloud upon plaintiff's title to and in the renewal copyright of the Song.

8. Defendant Graff and defendant Fisher have no right or interest of any nature whatsoever in and to the renewal

copyright in the Song, and have no right to claim or assert or represent to the trade or to anybody that they have any such right or interest.

9. Defendant Fred Fisher Music Co., Inc., has infringed plaintiff's renewal copyright in the Song by publishing, offering for sale and selling copies of the Song; by making a new arrangement of the Song and by publishing, offering for sale and selling copies of the said new arrangement.

[fol. 80] 10. Plaintiff is entitled to a preliminary injunction restraining defendant George Graff, Jr., his agents and servants, and defendant Fred Fisher Music Co., Inc., its officers, employees, agents and servants, during the pendency of this action and until the entry of final judgment, from printing, publishing, copying, vending or advertising or offering for sale the song entitled "When Irish Eyes Are Smiling"; annexed to the complaint herein as Exhibit "L", and referred to herein as the Song, and from printing, publishing or vending or advertising or offering for sale the arrangement of the Song annexed to the complaint and marked Exhibit "M" or any other version or arrangement of the Song, and from arranging or adapting the Song, and from performing the Song publicly for profit, and from using the song upon parts of instruments serving to reproduce it mechanically, and from granting any license or permission to any person, firm or corporation to do any of the foregoing acts, and from making or licensing any reproduction or use whatsoever of the Song in whole or in part, or of any arrangement or version thereof in whole or in part, and from asserting any claim or interest in plaintiff's renewal copyright in the Song, or in any renewal copyright thereof.

Dated: New York, May 26th, 1941.

Edward A. Conger, U. S. D. J.

[fol. 81] IN UNITED STATES DISTRICT COURT

INTERLOCUTORY DECREE—May 26, 1941

Present: Hon Edward A. Conger, U. S. D. J.

Plaintiff having applied for a preliminary injunction against defendants, Fred Fisher Music Co., Inc., and George

Graff, Jr., during the pendency of this action, and said application having come on to be heard:

Now, upon reading the notice of motion herein dated October 18th, 1940, the affidavits of Herman Starr verified October 18th, 1940 and December 13th, 1940 respectively, and the summons and complaint herein; in support of said application, and the affidavit of George Graff, Jr., verified December 5th, 1940 and the affidavit of John Schulman, Esq., verified December 5th, 1940, in opposition to said application, and after hearing R. W. Perkins, Esq., attorney for plaintiff, by Stuart H. Aarons of counsel, in support of said application, and Hays, St. John, Abramson & Schulman, Esqs., attorneys for defendants by John Schulman, Esq., in opposition thereto, and it appearing to the satisfaction of the court after due deliberation that the plaintiff demands and is entitled to an order against defendants Fred Fisher Music Co., Inc. and George Graff, [fol. 82] Jr. restraining the commission of the acts set forth below and that said defendants are actually engaged in committing such acts, to the irreparable injury of the plaintiff, it is

Ordered that defendant Fred Fisher Music Co., Inc., its officers, employees, agents and servants, and defendant, George Graff, Jr., his agents and servants be and they hereby are enjoined and restrained during the pendency of this action and until the entry of final judgment herein from printing, publishing, copying, vending or advertising or offering for sale the song entitled "When Irish Eyes Are Smiling," annexed to the complaint herein as Exhibit "L," and referred to herein as the Song, and from printing, publishing or vending or advertising or offering for sale the arrangement of the Song annexed to the complaint and marked Exhibit "M," or any other version or arrangement of the Song, and from arranging or adapting the Song, and from performing the Song publicly for profit, and from using the Song upon parts of instruments serving to reproduce it mechanically, and from granting any license or permission to any person, firm or corporation to do any of the foregoing acts, and from making or licensing any reproduction or use whatsoever of the Song in whole or in part, or of any arrangement or version thereof in whole or in part, and from

asserting any claim or interest in plaintiff's renewal copyright in the Song, or, in any renewal copyright thereof.

Edward A. Conger, U. S. D. J.

Dated: New York, May 26th, 1941.

[fol. 83] IN UNITED STATES DISTRICT COURT

APPEARANCES:

R. W. Perkins, Esq. (Stuart H. Aarons, Stanleigh P. Friedman, of counsel), Attorney for Plaintiff.

Hays, St. John, Abramson & Schulman, Esqs. (John Schulman, Robert J. Burton, of counsel), Attorneys for Defendants.

OPINION—March 24, 1941

CONGER, D. J.:

This is a motion to enjoin pendente lite defendants Fred Fisher Music Co., Inc., and George Graff, Jr., from printing, publishing, copying or vending the song "When Irish Eyes Are Smiling." No preliminary relief is requested against the other defendant, Mills Music, Inc.

In 1912, Ernest Ball, Chauncey Olcott and defendant Graff jointly composed the song "When Irish Eyes Are Smiling", Ball writing the music, Olcott and Graff the lyrics. Ball and Olcott have since died.

At the time of song was written Graff and Ball were under general contract to plaintiff, whereby, for stated royalties, they transferred to plaintiff all their property in songs which they composed, and which contracts contained the following clause:

[fol. 84] \* \* \* and the party of the second part (Graff) hereby expressly grants and conveys to the party of the first part (plaintiff) the copyright or copyrights of, with renewals and with right to copyright and renew, and property in any and all musical compositions which he may write or compose or acquire control of \* \* \* Olcott, although not under a general contract, transferred to plaintiff all his rights to this song by a separate agreement. The song was copyrighted in the name of the plaintiff on August 12, 1912, and was thereupon published.

On May 17, 1917, Graff sold, assigned, transferred and delivered to plaintiff for \$1600 all his rights to some 69 songs, including the song in question, and which transfer provided, in part:

• • • and all copyrights and renewals of copyrights and the right to secure all copyrights and renewals of copyrights in the same or in any arrangements or adaptations thereof, and any and all rights therein that I • • • may at any time be entitled to.

"And I do, for myself • • • hereby irrevocably authorize and appoint the Publisher, its successor, successors and assigns, my attorneys and representatives, in my name • • • to take and do such actions, deeds, and things, and make, sign, execute and acknowledge all such documents as may from time to time be necessary to secure to the Publisher • • • the renewals and extensions of the copyright in said compositions and all rights therein for the term of such renewals and extensions. And I agree, for myself • • • upon the expiration of the first term of any copyright in said composition, in this or in any country, to duly make, execute, acknowledge and deliver or to procure the due execution acknowledgment and delivery to the Publisher • • • of [fol. 85] all papers necessary in order to secure to it the renewals and extension of all copyrights in said compositions and all rights therein for the terms of such renewals and extensions."

This instrument was recorded in the United States Copyright Office on November 21, 1935.

On August 12, 1939, plaintiff, upon the authority of the above contract and upon special authority of Mrs. Oleott, applied for the renewal registration in the name of Graff and Mrs. Oleott, which renewal copyright was registered in the name of Graff and Mrs. Oleott.

On August 13, 1939, plaintiff, in the name of Graff, and pursuant to the authority above stated, and as attorney-in-fact for Graff, assigned Graff's interest in the renewal copyright to itself and recorded the assignment in the United States Copyright Office on August 14, 1939.

On August 23, 1939, Graff made personal application to the United States Copyright Office for a renewal regis-

tration, and after its registration, on October 24, 1939, he sold this renewal copyright to defendant Fred Fisher Music Co. Inc.

The question presented by this motion is whether or not Graff's original contract with plaintiff, and his later 1917 agreement in which he purported to give to plaintiff the right to obtain the renewal copyright in his name are not invalidated by the Copyright Law and against public policy, and hence a nullity.

Section 23 of the Copyright Law (17 U. S. C. A. 23) reads, in part, as follows:

"Duration; renewal. The copyright secured by this title shall endure for twenty-eight years from the date of the [fol. 86] first publication, whether the copyrighted work bears the author's true name or is published anonymously or under an assumed name; . . . And provided further, That in the case of any other copyrighted work, including a contribution by an individual author to a periodical or to a cyclopedia or other composite work when such contribution has been separately registered, the author of such work, if still living; or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children of the author be not living, then the author's executors, or in the absence of a will, his next of kin shall be entitled to a renewal and extension of the copyright in such work for a further term of twenty-eight years when application for such renewal and extension shall have been made to the copyright office and duly registered therein within one year prior to the expiration of the original term of copyright; . . ."

This section specifically provides that if the author be living, he alone has the privilege of obtaining the renewal in the twenty-eighth year, and if he be dead, the renewal privilege depends on the status of the persons mentioned in the statute who are living in the twenty-eighth year. (Fox Film Corp. v. Knowles, 261 U.S. 326.)

\*All reference to the renewal rights of the widows of Oleott and Ball have been omitted since this motion is concerned with only the claim of Fisher, which is based on the claim of Graff.

When Congress passed this section of the statute, the Committee to which the bill had been referred, rendered a report which reads as follows:

"Section 23 deals with the term of the copyright. Under existing law the copyright term is twenty-eight years, with the right of renewal by the author, or by the author's widow or children if he be dead, for a further term of four [fol. 87.] teen years. The act of 1790 provided for an original term of fourteen years, with the right of renewal for fourteen years. The act of 1831 extended the term to its present length. It was urged before the committee that it would be better to have a single term without any right of renewal, and a term of life of fifty years was suggested. Your committee, after full consideration, decided that it was distinctly to the advantage of the author to preserve the renewal period. It not infrequently happens that the author sells his copyright outright to a publisher for a comparatively small sum. If the work proves to be a great success and lives beyond the term of twenty-eight years, your committee felt that it should be the exclusive right of the author to take the renewal term, and the law should be framed as is the existing law, so that he could not be deprived of that right."

The renewal is a new right which accrues only upon application in the twenty-eighth year. (Fox Film Corp. v. Knowles, *supra*; White-Smith Music Pub. Co. v. Goff, 187 Fed. 247; Silverman v. Sunrise Pictures Corp., 273 Fed. 909; Danks v. Gordon, 272 Fed. 821; Harris v. Coco-Cola Co. 73 F. (2d) 370).

Defendants contend that the right of renewal could not be disposed of, alienated or assigned by Graff prior to the twenty-eighth year of the original copyright. Defendants state that, consequently, the agreements made by Graff prior to August 12, 1939 (the beginning of the twenty-eighth year) purporting to dispose of, alienate or assign, or agreeing to dispose of, alienate or assign the renewal copyright is unenforceable.

With defendants' contention I cannot agree. There is no doubt but that an ordinary assignment of the original copyright (similar to Graff's first assignment herein), [fol. 88] without specifically providing for the renewal of the copyright by the assignee in the author's name, would not give to plaintiff the right to apply for the renewal

copyright, in its own name or in the name of the author. (White-Smith Music Pub. Co. v. Goff, *supra*; Silverman v. Sunrise Pictures Corp., *supra*). Nor, if Graff had died, could his purported assignment of the renewal copyright be binding on his widow, executor, etc. (Fox Film Corp. v. Knowles, *supra*).

However, in the case at bar, Graff has specifically agreed to assign his personal right to the renewal copyright, and hence, if he be alive, which he is, he should be bound by his contract. In the case of *Tobani v. Carl Fischer Inc.*, 98 F. (2d) 57, (cert. denied 305 U. S. 650), the Circuit Court for this Circuit stated:

"The statute (§24) clearly provides that an additional term will vest in the author if he is living but he may divest himself of the right thus reserved for him by parting absolutely with his entire interest in a work or by an agreement to convey the copyright for the additional term when it shall be secure. In the former instance, he has no interest in the work, and cannot rightly claim an additional privilege granted by the statute. In the latter case, he is bound by his agreement to transfer to another the right when it shall accrue to him. The author here parted with his absolute property in the work and could not himself, if living, secure a renewal of the copyright."

"Although the case at bar is distinguishable from the cited case above on the facts, in that there the publisher or employer became the "author" of the copyrighted articles which were created for hire, nevertheless, the language from that case, in my opinion, is applicable to the situation herein.

[fol. 89] The cases cited by defendant in support of its position herein that it is against public policy for an assignee to obtain a renewal, even when that assignee has the authority to secure such renewal in the name of the author, treat such violations of public policy only in relation to an assignee of an original copyright attempting to secure a renewal; and these cases do not consider an agreement by the author to assign a renewal such as here present. In fact, language in some of these cases would seem to support plaintiff's contention. For instance, in *White-Smith Music Pub. Co. v. Goff*, the court said:

"It is therefore at least clear that, by the express terms of the statutes, whether the one existing when this copy-

right was taken out or the one existing when the extension was applied for, no one except the author or the members of his family or his executors could ordinarily apply for the extension; and this independently of any question for whose benefit the author or the other applicant might hold the copyright when acquired."

And in *Tobani v. Carl Fischer Inc.*, *supra*, it is stated:

"It is quite possible that, while an author cannot by any form of ~~contract~~ authorize his assignee to obtain the renewal, yet he may estop himself, from asserting it against the assignee, or may bind himself to hold the renewal copyright as trustee for his assignee, but such estoppel or trust obligation would be personal to the author and would not bind the widow, widower, children, etc. in case of the author's death before accrual of the right to renew, because they do not take under, or in privity with, the author, but by virtue of an independent statutory grant."

[fol. 90] The Attorney General of the United States, in an opinion on this subject, said:

"When the application for renewal is presented to the register of copyrights, the only thing left for his consideration is whether the applicant is one of the persons designated in the statute. But who may possess the legal or equitable right in the copyright after renewal is another question, and one which is to be determined by the terms of such contract as the author or other person or persons entitled to the renewal may have entered into before or after the renewal is had. (28 Op. Atty. Gen. 162).

And again, the Attorney General stated:

"And no doubt it (the renewal copyright) may be the subject of a valid contract before renewal, which would carry the equitable, if not the legal, title thereto when received. (28 Op. Atty. Gen. 169).

It would seem that the main intent of Congress was to give a separate right to authors to the fruits of their labors in the renewal copyright. This prevented proprietors and assignees of the original copyright from securing a renewal, but Congress did not, nor does it appear that the statute

prevents the author from specifically and separately agreeing to assign, and assigning, his own renewal rights when, and if, these renewal rights accrue.

The contract to give the renewal right is not similar to the assignment of the interest of a beneficiary in the income of a trust, nor to the assignment of a receiver's or executor's fees; nor to the right to file a mechanic's lien; nor to the right to receive alimony, which rights are, respectively, against public policy. The question herein is not analogous. [fol. 91] I have made a rather exhaustive search of the works of text-book writers on the subject of copyrights. While I have not quoted any of them, I find the majority are in accord with the holding herein.

In deciding this case I have not cited the cases of *Cowen v. Banks*, 24 How. Prac., 73 and *Paige v. Banks*, 80 U. S. 508, for the reason that there is some doubt as which statute was controlling, 1790 or 1831. The distinction is that under the statute of 1790 a renewal could be claimed not only by the author, but also by his assignee. While the statute of 1831 is practically similar to the present statute on this point, the contracts construed in each of the above-cited cases were contracts made prior to 1831.

Some question may be raised that, although plaintiff has the right to the renewal copyright, the procedure of obtaining the renewal herein is defective. However, there appears to me to be no material advantage gained in forcing plaintiff to bring an action for specific performance, or for a declaration of a trust in the author, for the benefit of plaintiff.

The motion for an injunction pendente lite, therefore, is granted as requested herein. Settle order on notice.

March 24, 1941.

U. S. D. J.

[fol. 92] IN DISTRICT COURT OF THE UNITED STATES

NOTICE OF APPEAL—June 20, 1941

Sirs:

Notice is hereby given that Fred Fisher Music Co., Inc. and George Graff, Jr., two of the defendants above-named, hereby appeal to the United States Circuit Court of Appeals for the Second Circuit, from the order granting the

plaintiff an injunction during the pendency of this action entered on the 26th day of May, 1941.

Dated New York, New York, June 20th, 1941.

Yours, etc., Hays, St. John, Abramson & Schulman, Attorneys for Defendants, Fred Fisher Music Co., Inc. and George Graff, Jr., Office & P. O. Address: 120 Broadway, Borough of Manhattan, City of New York.

To Clerk of the United States District Court for the Southern District of New York. R. W. Perkins, Esq., Attorney for Plaintiff, 321 West 44th Street, New York, New York. Samuel Jesse Buzzell, Esq., Attorney for Defendant, Mills Music Inc., 551 Fifth Avenue, New York, New York.

[fol. 93] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AS TO RECORD—September 25, 1941.

It is hereby stipulated and agreed that the foregoing is a true copy of the transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated New York, September 25, 1941.

Hays, St. John, Abramson & Schulman, Attorneys for Defendants, Fred Fisher Music Co., Inc. and George Graff, Jr. R. W. Perkins, Attorney for Plaintiff.

[fol. 94] Clerk's Certificate to foregoing transcript omitted in printing.



[fol. 95] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE  
SECOND CIRCUIT, OCTOBER TERM, 1941

No. 123.

(Argued December 12, 1941. Decided February 11, 1942)

M. WITMARK &amp; SONS, Plaintiff-Appellee,

v.

FRED FISHER MUSIC CO., INC., GEORGE GRAFF, JR., Defendants-Appellants,

and

MILLS MUSIC, INC., Defendant

Appeal from the District Court of the United States for  
the Southern District of New York

Action by M. Witmark & Sons against Fred Fisher Music Co., Inc., George Graff, Jr., and Mills Music, Inc., for copyright infringement. From an interlocutory decree enjoining the two first-named defendants *pendente lite* from printing, publishing, copying, or vending the song "When Irish Eyes Are Smiling," 38 F. Supp. 72, they appeal. Affirmed.

Before Augustus N. Hand, Clark and Frank, Circuit  
Judges.

[fol. 96] Stuart H. Aarons, of New York City (R. W. Perkins, of New York City, on the brief), for plaintiff-appellee;  
John Schulman, of New York City (Hays, St. John, Abramson & Schulman and Milton Sargoy, all of New York City, on the brief), for defendants-appellants.

CLARK, Circuit Judge:

We are presented with a question of statutory construction which has apparently never arisen before, though the general statutory provision has existed for over a hundred years. Simply stated, the problem is whether or not a copyright holder may assign his expectancy of the renewal right which arises under 17 U. S. C. A. §23 at the expiration of the original twenty-eight year copyright grant. The district court upheld the validity of the assignment. 38 F. Supp. 72. This was in accordance with a strong dictum of this court in the case of *Tobani v. Carl Fischer, Inc.*, 2 Cir., 98 F.

2d 57, 60, *certiorari* denied 305 U. S. 650, 59 S. Ct. 243, 83 L. Ed. 420. We think it interpreted the law correctly.

The question arose in connection with the renewal of the copyright on the song "When Irish Eyes Are Smiling." One of the defendants, George Graff, Jr., collaborated in the writing of this song in 1912, at which time he was acting under a general agreement to assign all copyrights to the plaintiff, M. Witmark & Sons, with a reservation of royalties. Five years later, Graff has stated, he was in financial difficulties; at any rate he then entered into a second agreement with the plaintiff by which for the consideration of \$1,600 he released all his royalties on some sixty-nine [fol. 97] songs, including "When Irish Eyes Are Smiling," and also made a further assignment of the renewal rights. This further assignment purported to bind Graff and his "heirs, executors, administrators and next of kin," and granted an irrevocable power of attorney to plaintiff to execute in Graff's name or that of his heirs, etc., all documents necessary to secure the renewal of the copyright and all rights therein for the term of the renewal. That is, the assignment was supported by the traditional power of attorney to enforce its terms, which has historically been the bridge whereby assignments anciently not recognized "at law" were actually made effective according to the intent of the parties. Cook, *The Alienability of Choses in Action*, 29 Harv. L. Rev. 816, 822, 824; Ames, *Lectures on Legal History*, 213, 214; 34 Yale L. J. 409; *In re Barnett*, 2 Cir., — F. 2d —, —. This agreement, dated May 19, 1917, was duly recorded in the Copyright Office on November 19, 1935.

On August 12, 1939, the first day of the twenty-eighth year of the copyright in question—renewals must be applied for within that year—plaintiff entered an application for renewal in Graff's name, registered the renewal in Graff's name, assigned the renewal copyright to itself, and recorded the assignment. Eleven days later Graff applied for his renewal and assigned this renewal to defendant Fred Fisher Music Co.<sup>1</sup> When Fisher threatened to publish the

<sup>1</sup> It should be noted that Chauncey Oleott and Ernest Ball, who collaborated with Graff, died before the renewal period. Oleott's widow assigned her renewal to the plaintiff; Ball's widow assigned hers to defendant Mills Music, Inc. Since Mills does not threaten to publish the song, the injunction does not run against it.

song, the plaintiff instituted this action asking for an injunction, accounting, and damages, and moved for an injunction *pendente lite*. On the grounds that the assignment was valid, the motion was granted below and this appeal followed.

[fol. 98] We start with the statute. It says that "the author \* \* \* if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then the author's executors, or in the absence of a will, his next of kin shall be entitled to a renewal and extension of the copyright \* \* \* for a further term of twenty-eight years when application for such renewal and extension shall have been made \* \* \* within one year prior to the expiration of the original term of copyright." 17 U. S. C. A. §23. It is conceded by all concerned that this creates only an expectancy, and that in any event the author must be alive on the first day of the twenty-eighth year in order to obtain a renewal. An assignment of this expectancy likewise must rest also on survival. It is also apparent that the assignment here would not have cut off the rights of renewal extended to the widow, children, executors, or next of kin, in the event of Graff's death prior to the renewal period. See *Fox Film Corp. v. Knowles*, 261 U. S. 326, 43 S. Ct. 365, 67 L. Ed. 680. The only contested point is whether or not the statute absolutely forbids assignment. Certainly the passage does not say it does. There are no words that an assignment "shall be void and of no effect," as, for example, in 38 U. S. C. A. §129, dealing with the pledge or transfer of a pension. If we had no more than the words of the statute to go on, we could hardly find in that a restraint on freedom of assignment.

Reliance is had, however, upon the statutory history. The Copyright Act of 1790 said that the "exclusive right shall be continued to [the author], executors, administrators or assigns." 1 Stat. 124. In 1831, the Act was amended; and in changing the renewal provision to approximately its present form, the words "executors, administrators or assigns" dropped out. 4 Stat. 436. This, we are [fol. 99] told, indicates that assignments are not tolerated.<sup>2</sup>

<sup>2</sup> In *Paige v. Banks*, 13 Wall. 608, 20 L. Ed. 709, the Court upheld an assignment made in 1828, as a transfer of a right of renewal *after* and under the Act of 1831. Assignment of

But it may just as well be argued that the statute sought only to prevent an assignment that would cut off the widow's and children's rights in case the author died; or that Congress intended only the author and his family to be able to get a renewal, and thus "executors, administrators" went out along with "or assigns"; or, as said in *White-Smith Music Pub. Co. v. Goff*, 1 Cir., 187 F. 247, 250, that Congress enacted "an entirely new policy, completely dis severing the title, breaking up the continuance in a proper sense of the word, whatever terms, might be used, and vesting an absolutely new title *à nominé* in the persons designated." All that this says, however, is that assignment of copyright is not assignment of renewal; that renewal is an expectancy, not a present right. It does not express a public policy against disposal of the possibility of renewal. We cannot find a policy of "void and of no effect" in this change. Nor do the *Goff* case and others like it express such a policy. At most they indicate that an assignment would have to be like the one in this case to be effective. And since the issue was not present in those cases, it was not passed upon. See *Fox Film Corp. v. Knowles*, *supra*; *Silverman v. Sunrise Pictures Corp.*, 2 Cir., 273 F. 909, 19 A. L. R. 289, *certiorari denied* 262 U. S. 758, 43 S. Ct. 705, 67 L. Ed. 1219.

More to the point is the Congressional Report on the Act of March 4, 1909, which is the present statute, 17 U. S. C. A. §23—except for a slight textual change of 1940, here immaterial. The committee was supporting the decision to extend the right of renewal another fourteen years to make a [fol. 100] total renewal period of twenty-eight years, and it stated its preference for this arrangement, rather than a single and longer term as for life or fifty years. So it said: "Your committee, after full consideration, decided that it was distinctly to the advantage of the author to preserve the renewal period. It not infrequently happens that the author sells his copyright outright to a publisher for a comparatively small sum. If the work proves to be a great success and lives beyond the term of twenty-eight years, your com-

the contingent right of renewal was upheld under the English statute, 8 Anne, c. 19, 1709. *Carpán v. Bowles*, 2 Bro. C. C. 80, 29 Eng. Rep. 45, 1786.

We see little that illuminates our present issue in the Committee Reports on the 1831 Act. Register of Debates, vol. 7, App. exix.

mittee felt that it should be the exclusive right of the author to take the renewal term, and the law should be framed as is the existing law, so that he could not be deprived of that right.

"The present term of twenty-eight years, with the right of renewal for fourteen years, in many cases is insufficient. The terms, taken together, ought to be long enough to give the author the exclusive right to his work for such a period that there would be no probability of its being taken away from him in his old age, when, perhaps, he needs it the most." H. R. Rep. No. 2220, 60th Cong., 2d Sess., p. 14. The House Report was adopted by the Senate Committee on Patents as its own. Sen. Rep. No. 1108, 60th Cong., 2d Sess.

We think it fair to say that defendants' case substantially depends on this quotation, as expressing a clear intent as to the statutory meaning and one to which we should give effect. But several observations must be made about it, for it contains its own ambiguities. Its direct purpose was clearly to explain the *continuance* of a renewal term as against the substitution of a single long term. In other words, it argued for an existing arrangement—"the existing law"—and so not necessarily or clearly for an absolute prohibition. If the committee had really meant the latter, they could easily have so drafted the statute. And they could easily have stated their purpose in unambiguous words in their report. As it is, their own words are almost [fol. 101] as ambiguous as the statute itself. They said the author "could not be deprived of" the right to renew. Does this mean he could not be deprived of it if he "sells his copyright outright to a publisher"? <sup>3</sup> If so, we agree. Or did they mean that a court was to strike down the author's

<sup>3</sup> One treatise on copyright states that publishers sought unsuccessfully to induce the committee to include an amendment requiring author and assignee publisher to unite in renewal, thus preserving a publisher's investment in plates. Bowker, Copyright, 1912, 117. This establishes nothing more than the committee report does. Publishers are still dependent on the author's survival. Probably they would have liked to secure more than a precarious expectancy; that they were unsuccessful does not show that even that was taken away.

attempt specifically to dispose of his expectancy? If so, "deprive" was a poor word to use, for the result is that he is "deprived" of his privilege to alienate his renewal right, not saved from "deprivation" of the right itself. As for the statement about the "probability of its being taken away from him in his old age," this is no more than a repetition of the same thought, and suffers from the same ambiguity.

If we could find that the statute had been interpreted—in the light of the committee's report—to forbid such assignments as we find, here, we might well be inclined to give the committee the benefit of any doubts as to the language they had chosen.<sup>4</sup> Meaning is frequently obscure, and courts may well be sympathetic to clear Congressional statements of what they think they are doing. *United States v. Dickerson*, 310 U. S. 554, 60 S. Ct. 1034, 84 L. Ed. 1356; Hamilton and Braden, *The Special Competence of the Supreme Court*, 50 Yale L. J. 1339, 1357-1367; cf. Radin, *Statutory Interpretation*, 43 Harv. L. Rev. 863. But we do not find such interpretation; so far as we can ascertain, the general view has been to the contrary. Soon after passage of the Act, Assistant Attorney General Fowler observed that "no doubt it [the renewal] may be the subject of a valid contract before renewal, which would carry the equitable, if not the legal, title thereto when [fol. 402] renewed";—28 Ops. Atty. Gen. 162, 169. Such also appears to have been the attitude of the people affected by copyright law as manifested in the treatises on the subject. Four treatises published before 1909 are definite in stating that an author may validly assign his expectancy of renewal,<sup>5</sup> and none that we have found deny it. After 1909, it is true that some of the experts tended to hedge. Four treatises published after the new act went into effect state that probably an assignment can be enforced;<sup>6</sup> but

<sup>4</sup> Drone, *The Law of Property*, 1879, 326, 332; MacGillivray, *The Law of Copyright*, 1902, 267; 2 Morgan, *The Law of Literature*, 1875, 230; Curtis, *The Law of Copyright*, 1847, 235.

<sup>5</sup> Marchetti, *Law of the Stage, Screen and Radio*, 1936, 67; DeWolf, *Outline of Copyright Law*, 1925, 66; Weil, *Copyright Law*, 1917, 367; Bowker, *Copyright*, 1912, 117.

three others are fairly definite about it.<sup>6</sup> Only one of those we have found seems to deny assignability.<sup>7</sup> Of particular interest is Wittenberg's treatise on Literary Property cited in the footnote. He purports to set out model contracts to be used by authors and publishers, and by authors and motion picture producers for movie rights. In the publishing contract, he admonishes the author to retain the copyright in his own name and grant only an exclusive right. But Wittenberg also insists that a provision be included whereby an author agrees to obtain a renewal and to assign the exclusive right under the renewal. This, he says, is because "the right to renew copyright . . . rests with the author, and he should agree to renew for the joint protection of himself and the publisher." Wittenberg, 195-196. [fol. 103] A similar clause is contained in the model movie rights contract. *Ibid.* 261.

Here, then, is a substantial number of writers on the subject all tending to say the same thing: that only an author can renew, but that he can make binding agreements to renew for someone's benefit. It seems not unreasonable to conclude from this that such a belief doubtless exists throughout the trade. Naturally, neither this belief, if it exists, nor the authorities themselves in any way bind us. Yet some weight may be attached to the fact that an ambiguous statutory provision has fairly uniformly been interpreted one way, and presumably acted upon.

Perhaps even more persuasive is the history of further attempts to amend the copyright laws. The attempts were aimed at general revision, usually including a change in the duration of the copyright; but for our purposes only the provisions relative to the preservation of the status of copyrights existing at what would be the time of enactment of these bills are of interest.

<sup>6</sup> 2 Laidas, International Protection of Literary and Artistic Property, 1938, 773; Wittenberg, Literary Property, 1937, 45; Frohlich & Schwartz, The Law of Motion Pictures, 1918, 549.

<sup>7</sup> Amdur, Copyright Law and Practice, 1936, 532, 538, 540-541. His long discussion is unilluminating, however, for he appears not to have considered any problem but that of the assignee's renewing in his own name.

In two bills we find this passage: "*Provided*, that where the author has . . . agreed to part therewith for the renewal term under said act" [with terms following to make the renewal contract fit the time periods of the proposed act]. H. R. 6990, 71st Cong., 2d Sess.; H. R. 10434, 69th Cong., 1st Sess. And in two others this provision appears: "where . . . the author has agreed to renew the copyright for the renewal term for the benefit of the assignee or licensee" [with similar terms following]. H. R. 11948, 72d Cong., 1st Sess.; H. R. 30976, 72d Cong., 1st Sess. Still a fifth bill, which passed the House, says much the same thing in only slightly different words. H. R. 12549, 71st Cong., 3d Sess.<sup>8</sup> This, we conceive, constitutes a recognition on the part of the drafters at least, of the validity under the 1909 Act of assignment of expectancies.<sup>9</sup> A somewhat more direct acknowledgment of the validity of assignments is found in three other bills. These provide that the continuation of the copyright beyond twenty-eight years shall vest "in the person or persons . . . who would have been entitled to the renewal term . . . subject to any agreement valid in law or equity, which may have been made for the disposal of the renewal term prior to the date when this section, as amended, takes effect." H. R. 926, 76th Cong., 1st Sess.; H. R. 5275, 75th

<sup>8</sup> The committee report on this bill appears to recognize assignments, for it speaks of retaining the "absolute revision" of renewal—to "parallel" that of the 1909 Act—in the author's representatives, "regardless of his assignments." H. R. Rep. No. 1689, 71st Cong., 2d Sess., p. 10.

<sup>9</sup> We may point out that the terms provided for in the bills were: (1) if the original copyright assignment was on a royalty basis, the same royalty was to be paid during the renewal period; (2) if the original copyright had been sold for a lump sum, two bills said the same sum should be paid again, and two bills said "the author and/or the owner shall be entitled to the [renewal], upon performance of such conditions as may be determined by agreement, or in the absence of an agreement . . . by the court, as justice may require." That Graff would probably have obtained a further payment from the plaintiff had any of these bills passed is immaterial so far as the present discussion is concerned.

Cong., 1st Sess.; S. 2240, 75th Cong., 1st Sess.<sup>10</sup> All told, those Congressmen interested in copyright law seem to have taken it for granted that an author could agree to assign the renewal to someone. If they went that far, undoubtedly they would agree that an author could authorize someone to act in his name when the renewal period arrived.

Notwithstanding this history, we might well be moved by a demonstration that only by holding all assignments void could we further the policy of the act. But even this seems to us quite doubtful. True, it would be nice for an author to look forward to more money when the renewal [fol. 105] time comes. But he can do that by not assigning. What we would be saying is that all authors who have already assigned can eat their cake and have it too. Only in the future would such a ruling be fair all-around. Furthermore, it is not clear that authors wish to be deprived of the privilege of obtaining more money now, or that a widow whose husband dies penniless wishes to be deprived of the privilege of anticipating on her statutory renewal right. We are, in effect, asked to impose forced saving on authors and widows by requiring them to forego for twenty-eight years whatever additional money they could obtain by assignment of their expectancies. It should require more than an ambiguous committee report on an ambiguous statutory provision to produce such a drastic restriction on free assignability.

This conclusion is reinforced by the history of judicial disapproval of restraints on assignability. Thus lawyers discovered a way around the archaic rule against assignment of choses in action, courts of equity supported them directly, and courts of law winked at the result. Cook, *op. cit. supra*. Equally familiar are the general rules against restraints on alienation of property.<sup>11</sup> There may

<sup>10</sup> It is worth mentioning that the quoted section appears to be inconsistent with an earlier section which seems to deny the validity of such agreements. Compare § 24 with § 23, H. R. 926, *supra*. The explanation seems to be that § 23 referred only to unpublished works.

<sup>11</sup> Carey and Schuyler, *Illinois Law of Future Interests*, 1941, c. 13, esp. §§ 421, 434, 439; Schnebly, *Restraints Upon the Alienation of Legal Interests*, 44 *Yale L. J.* 961-995, 1186-1215. Schnebly says (at 961): "Indeed, a substantial

be mentioned, also, the unsuccessful attempts of employers to prevent wage assignments; and the consequent specific legislation forbidding or regulating such assignments. One such statute was even declared unconstitutional. *Massie v. Cessna*, 239 Ill. 352, 88 N. E. 152; see, generally, Fortas, [fol. 106] *Wage Assignments in Chicago*, 42 Yale L. J. 526. And there is the unusual case of an unenforceable assignment of an interest under a spendthrift trust being enforced by the pleasant fiction of calling it a "contract to assign," with the amount assigned as the measure of damages. *Kelly v. Kelly*, 11 Cal. 2d 356, 79 P. 2d 1059; 48 Yale L. J. 666. Further, there is our own recent holding that an assignment of an expectancy under a will is valid, *In re Barnett*, *supra*; 3 Restatement, Property, § 316; and generally of contingent interests in modern law, 2 Restatement, Property, § 162. Our society still rests on the theory that men can ordinarily make free disposition of their property rights. We are perfectly willing to uphold a Congressional declaration that public policy forbids assignment of a copyright renewal; but we expect something more than ambiguous inferences drawn from a committee report explicitly arguing only for continuance of an existing statutory scheme with a new renewal period. If property rights are to be rendered immediately untranslatable into money or money's worth, in order to protect remote and contingent future gains, that result should be accomplished by legislative declaration, not by judicial fiat.

We are limiting our discussion, as did the parties before us, to the question of statutory interpretation. On this interlocutory issue we ought not to foreclose other contentions which the parties may wish and be entitled to raise on the merits, including possibly claims of inadequacy of consideration in 1917, so gross as to prevent negative enforcement of the assignment, with which would go the question of adequacy of damages as a remedy for breach.

portion of the history of real property law consists in the record of various legal devices whereby it was sought to make land inalienable, and of the means whereby the courts thwarted those efforts in order to protect what they deemed to be the larger social good. See, also, *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U. S. 373, 404; 31 S. Ct. 376, 55 L. Ed. 502, 517; *Bobbs-Merrill Co. v. Straus*, 210 U. S. 339; 28 S. Ct. 722; 52 L. Ed. 1086.

Restatement, Contracts, §§ 358, 363, 367, 380. But we think, we should say that the record contains no evidence which casts doubt on the consideration; certainly defendant Graff's statement that royalties on the songs covered by the assignment had amounted to as much as \$5,000 annually (i.e., as a maximum) does not do so, particularly in view of the well-known ephemeral nature of popular song hits. Indeed, defendants base their assertion of the song's present value on the new developments of radio, electrical transcription, and sound motion pictures. And their advertising adds that sung by Oleott "for a year or two and then having lived its hour, it seemed destined to be forgotten" until "a Dublin minstrel," returning "to his native isle," made it part of "the folk lore of Ireland," whence it came back here to a seemingly delayed, albeit considerable, present success.

Affirmed.

FRASER, C. J., dissenting:

1. From most interlocutory orders there is no appeal. From an interlocutory injunction, because of its marked capacity for harm, Congress permits an appeal. Unusual caution should be exercised in the issuance of such an order. Cf. *Watson v. Buck*, 313 U. S. 387. In the case at bar, the preliminary injunction seriously intrudes on defendants, restraining them from continuing sales—which had been going on for about a year—of the copyrighted song and adversely affecting their good will. That order was improper if, on the facts presented, assuming, for present purposes, that they will be the facts on final hearing, it seems unlikely that plaintiff will be granted the final relief sought, a decree for specific performance.<sup>1</sup> I think the order should be re-

<sup>1</sup> The district court said in its opinion: "Some question may be raised that although plaintiff has the right to the renewal copyright, the procedure of obtaining the renewal herein is defective. However, there appears to me to be no material advantage gained in forcing plaintiff to bring an action for specific performance, or for a declaration of trust in the author for the benefit of plaintiff."

Plaintiff, in its brief relied on *G. Schirmer v. Robbins Music Corp.*, 28 N. Y. S. (2d) 699 (1941) which, said plaintiff, "accepted the decision of the court below as controlling upon the State Court in decreeing specific performance of a similar contract."

[fol. 108] versed, because on the facts as they now appear, a court of equity should not grant specific performance, in the light of the subject matter of the contract, the circumstances and relations of the parties when it was made, and the consideration paid.

In 1917, when the contract was made, the plaintiff was a successful publisher, and the defendant Graff, an author or lyricist. It is admitted on this record that Graff was then "in desperate financial straits." By that agreement, Graff

(a) released plaintiff from the obligation, existing under an earlier agreement, to pay to defendant, over a considerable future period, annual royalties, on a group of some seventy songs, which royalties "had amounted in previous years to as much as \$5000 annually"; and

(b) contracted to give plaintiff his personal contingent rights to renew the copyrights on those seventy songs, if ever those rights should later ripen, i.e., if Graff should live twenty-two years longer, until 1939.

The consideration was a lump sum payment to Graff of \$1600. The released royalties alone were almost certain, in a short period, to equal the entire consideration of \$1600; on that basis, nothing was actually received for the renewal rights. But even if we assume that nothing was paid for the released royalties and the entire \$1600 was paid for the renewal rights, then, as there were seventy songs, the amount paid for the renewal right to the particular song involved in this suit was one-seventieth of \$1600 or about \$23. The right to renew a copyright twenty-two years later—a right which on no assumption could have any worth to the purchaser unless the author lived for twenty-two years [fol. 109] more—was, of course, highly speculative in value. The speculation has proved immensely valuable for the plaintiff.

<sup>4</sup>The present value of the renewal right to the song in suit is not estimated in the moving papers. However, it was used 6,335 times on the radio in 1939, and there are a number of prospective profitable uses which have come into being since the date of the assignment, such as electrical transcriptions for radio, motion-picture sound tracks, coin-operated public phonographs and radio broadcasting. In

In considering those facts, we should take judicial notice of the economic capacities and business acumen of most authors. In ascertaining that certain persons, because "often under economic compulsion," constituted a "necessitatis class," our present Chief Justice, in 1928, used, judicially, off-the-record knowledge which no casual inquiry would elicit—such as the contents of a report by the City Club of New York, of the proceedings of the Association of Governmental Labor Officials, and the like.<sup>3</sup> We need not go nearly so far here. We need only take judicial notice of that which every schoolboy knows—that, usually, with a few notable exceptions (such as W. Shakespeare and G. B. Shaw), authors are hopelessly inept in business transactions and that lyricists, like the defendant Graff, often sell their songs "for a song."

its moving paper, appellee's president urges that the song "is one of the most celebrated ballads of our times," and that an injunction is necessary to prevent "substantial monetary damage."

There were similar renewal rights to several other songs sold by Graff to the plaintiff in the same contract—including the well-known "*Till The Sands of the Deserts Grow Cold*"—which have admittedly "become world famous."

<sup>3</sup> Dissenting opinion in *Ribnik v. McBride*, 277 U. S. 350, 361, 364-370 (1928). That dissent is now good doctrine in the light of *Olsen v. Nebraska*, 313 U. S. 236, 244-246 (1941).

Mr. Justice Brandeis confessedly went out of the record to acquaint himself, judicially, with "the art of breadmaking and the usages of the trade; with devices by which bakers of bread are imposed upon and honest bakers or dealers are subjected by their dishonest fellows to unfair competition; with the problems which have confronted public officials charged with the enforcement of the laws prohibiting short weights; and with experience in administering those laws."

obtaining such information from a variety of sources, including a letter, written in 1917, by Herbert Hoover to President Wilson; *Jay Burns Baking Co. v. Bryan*, 264 U. S. 504, 517, 533 (1924). Cf. *Oklahoma v. Guy F. Atkinson Co.*, 313 U. S. 508 (1941).

For these and related matters, see Davis, *An Approach to Problems of Evidence in The Administrative Process*, 54, Harv. L. Rev. (1942) 364, 403-405.

Here, then, is a case where (a) the defendant was an author, one of a class of persons notoriously inexperienced [fol. 110] in business, and the particular author was actually, at the time, in desperate financial straits, while the plaintiff was a successful and experienced publisher; (b) the property contracted for was of such a character that, when the contract was made, "neither party could know approximately the value," so that "it was a bargain made in the dark"; and (c), the consideration was a very small sum.

That is not the kind of contract which equity will specifically enforce. Although Chancellor Kent, in a well-reasoned early case, *Symour v. Delauch*, 6 Johns. Ch. 222, concluded that inadequacy of consideration alone would bar specific performance of a contract, his views were rejected on appeal by a bare majority, 3 Cow. 445; in what became the leading American case. More recently, however, there has been a growing tendency to adopt Chancellor Kent's view. But we need not rely on such authorities, for it is well-established that specific performance will be denied where, in addition to inadequate consideration, other factors contribute to the inequity of the bargain. See 2 Chafee and Simpson, *Cases on Equity* (1934) 1173-1193, especially note 5, page 1185. Among the factors to be considered are lack of advice by one contracting party, *Ames v. Ames*, 91 N. E. 509, 46 Ind. App. 597; *Baughan v. Maloney*, 85 N. E. 839, 200 Mass. 46; differences in business experience or information, *Margraf v. Muir*, 57 N. Y. 155; especially if an improvident contract is the result; *Pickett v. Comstock*, 229 [fol. 111] N. W. 249 (Iowa).<sup>33</sup> Where a small lump sum consideration is coupled with the sale by an inexperienced seller of property highly problematic in value, equity will deny relief. *Marks v. Gates*, 154 Fed. 481 (C. C. A. 9); cf. *Federal Oil Co. v. Western Oil Co.*, 121 Fed. 674 (C. C. A. 7); and cases cited in 58 C. J. 954-957; Pomroy, *Specific Performance of Contracts* (3d ed. 1926) Sections 192-198. In *Marks v. Gates*, *supra*, the plaintiff asked for specific performance of a contract by which the defendant agreed to convey to him a twenty per cent interest in any property he should acquire in the Territory of Alaska. The consideration was \$1000 in cash, and the cancellation of a debt of

<sup>33</sup> Cf. *Miss. & Mo. R. R. Co. v. Cromwell*, 91 U. S. 643, 645-646; *Randolph v. Quidnick Co.*, 135 U. S. 457, 459.

\$11,225. Within two years, the defendant had acquired certain mining properties, worth more than \$750,000. In denying specific performance, the Circuit Court of Appeals for the Ninth Circuit said that the contract bound the defendant to convey "property of which neither party could know even approximately the value. It was a bargain made in the dark . . . . Where the consideration is so grossly inadequate as it is in the present case, and the contract is made without any knowledge at the time of its making on the part of either of the parties thereto of the nature of the property to be affected thereby, or of its value, no equitable principle is violated if specific performance is denied, and the parties are left to their legal remedies, if any they have."

For the foregoing reasons, the order for an interlocutory injunction should be reversed.<sup>4</sup>

[fol. 112] 2: It should also be reversed because there can, I think, be no enforcement, under the Copyright Act of 1909, of a contract for the sale of an author's renewal option if made prior to the date when the author is himself able to exercise that option.

My previous discussion has a bearing on the interpretation of that Act. For, as the equitable policy of denying enforcement of certain contracts for the sale of property, which I have just considered, rests upon non-statutory grounds, it serves to answer my colleagues' suggestion that, we must take it for granted that the policy of our legal system is steadfastly opposed to any impediments on the freest possible alienability by all men of their property, and should construe this statute accordingly.

As one might surmise, Congress had fully in mind the inexperience of authors. As I shall show, it desired to protect them against the very sort of improvident agreement

<sup>4</sup> The defendants seem not to be financially responsible. That alone, however, is no ground for a preliminary injunction, and surely not when there are other means of protecting plaintiff, should it ultimately win, without doing unnecessary harm to defendants should they ultimately succeed. At most (assuming that any agreement made prior to the renewal date to sell a renewal right can be valid) the interim order should not have gone beyond an impounding, *pendente lite*, of the receipts of defendants from sales of the song.

for the disposition of their contingent renewal privileges which, in the case at bar, the majority opinion holds to be enforceable. Indeed, my colleagues, a few weeks ago, joined in an opinion in which it was said (in passing, to be sure) that the very section of the Act now before us "imposes [a limitation] upon the author's power to dispose of the right of renewal during his life" which was "clearly intended to protect widows and children from the supposed imprudence of authors" [\* \* \*] *Skapiro, Bernstein & Co., Inc. v. Bryan, et al.* — F. (2d) — (December 1, 1941). [Incidentally, that recent decision makes it unnecessary to give any weight to the *obiter dictum* in the opinion of Marston, J., in *Tobani v. Carl Fischer, Inc.*, 98 F. (2d) 57, 60, to which the majority opinion in the instant case refers with approval.]

The majority opinion grants, as it must, that Congress put some very real restraints on the author's power to dispose [fol. 113] of his statutory renewal option. One who purchases it under a contract made prior to the renewal date acquires nothing; even the majority concedes, if the author is not alive on that date; if he dies intestate before then, his creditors cannot avail themselves of that option on the renewal date, even if he leaves no widow or children, because Congress expressly said that the option should then pass to his next of kin and not to his administrator. And the majority admits, also, that the statute does not clearly provide that if the author is alive on the renewal date, the option passes to a purchaser under such a contract as is before us in the instant case. We must, therefore, turn to the legislative history.

My colleagues give a partial quotation of the Congressional committee reports concerning the 1909 Act. Those reports, in discussing the author's right to a renewal term, say that "the law should be framed as is the existing law, so that he could not be deprived of that right," and cannot have it "taken away from him in his old age when he needs it the most." Since the 1909 report refers to the then "existing law," the 1831 Act, we should examine—as the majority does not—the following comments of the Congressional Committee made at the time when the 1831 Act was enacted:

"At the second session of the first Congress, a statute was passed to secure to authors the copy-right of their books, charts and maps. In 1802, a like statute was passed

to secure the copy-right of prints. In both of these Statutes, there are provisions which are useless and burdensome, and in which there are likewise discrepancies. \* \* \* In the United States, by the existing laws, a copy-right is secured to the author, in the first instance, for fourteen years; and if, at the end of the period, he be living, then for fourteen years more; but, if he be then not living, then the copy-right [fol. 114] is determined although, *by the very event of the death of the author, his family stand in more need of the only means of subsistence ordinarily left to them.* \* \* \*

"The bill secures to the author a copyright for twenty-eight years, in the first instance, with a right of renewal for fourteen more, if, at the end of the first period, the author be living, or shall have a family. \* \* \* The scholar, who secludes himself and wastes his life, and often his property, to enlighten the world, has the best right to the profits of those labors. \* \* \* Shall we not encourage the means of that knowledge, and enlighten that virtue \* \* \*? We ought to present every reasonable inducement to influence men to consecrate their talents. \* \* \* *It cannot be for the interest or honor of our country that intellectual labor should be depreciated, and a life devoted to research and laborious study terminate in disappointment and poverty.* \* \* \* *The question is, whether the author or bookseller shall reap the reward.*"

With that Congressional purpose as to the 1831 Act in mind, we can the better get at the Congressional intention in enacting the 1909 Act by quoting (more extensively than do my colleagues) from the Committee Reports on that Act:

"It was urged before the committee that it would be better to have a single term without any right of renewal, and a term of life and fifty years was suggested. Your committee, after full consideration, decided that it was distinctly to the advantage of the author to preserve the renewal period. *It not infrequently happens that the author sells his copyright outright to a publisher for a comparatively small sum.* If the work proves to be a great success [fol. 115] and lives beyond the term of twenty-eight years, your committee felt that it should be the exclusive right of

House Report No. 2220, 60th Cong., 2d sess., p. 14 *et seq.*  
The Senate Committee adopted this report.

the author to take the renewal term, and the law should be framed as is the existing law, so that he could not be deprived of that right. The present term of twenty-eight years, with the right of renewal for fourteen years, in many cases is insufficient. The terms, taken together, ought to be long enough to give the author the exclusive right to his work for such a period that there would be no probability of its being taken away from him in his old age, when, perhaps, he needs it the most. A very small percentage of the copyrights are ever renewed. All use of them ceases in most cases long before the expiration of twenty-eight years.

*"In the comparatively few cases where the work survives the original term, the author ought to be given an adequate renewal term."*

We should, in the case before us, carefully consider especially these sentences from those two Reports: "The question is whether the author or bookseller should reap the reward," "It not infrequently happens that the author sells his copyright outright to a publisher for a comparatively small sum." Surely, in the light of the Congressional purpose thus disclosed, we ought not so construe the statute that the publisher and not the author will "reap the reward," when, as here—and as "not-infrequently happens"—the "author sells his copyright outright for a comparatively small sum."

"The report" also said: "your committee do not favor and the bill does not provide for any extension of the original term of twenty-eight years, but it does provide for an extension of the renewal term from fourteen years to twenty-eight years; and it makes some change in existing law as to those who may apply for the renewal. Instead of confirming the right of renewal to the author, if still living, or to the widow of children of the author, if he be dead, we provide that the author of such work, if still living, may apply for the renewal, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower or children be not living, then the author's executors, or, in the absence of a will, his next of kin. *It was not the intention to permit the administrator to apply for the renewal, but to permit the author who had no wife or children to bequeath by will the right to apply for the renewal.*"

The Committees almost literally described the facts of the instant case: Graff sold outright his original term for a small sum. His turned out to be one "of the comparatively few cases where the work survives the original term." It was to meet just such a contingency, the Committees said, that Congress gave "the author the exclusive right" to "an adequate renewal term" so that he could, in such a case, "reap the reward" in "his old age." We should see to it, that, as Congress intended, the "right of the author to take the renewal term" is so hedged about that he can "*not be deprived of that right*" by having it "*taken away from him in his old age when he needs it the most.*"

I find it difficult to regard those expressions of the Committees as mere idle talk, or as so ambiguous that we can laugh them off. The considerations which they present fully answer the suggestion in the majority opinion that, if we do not allow the author to contract away his contingent renewal privilege before it ripens, we may be depriving him of a means of procuring funds, by a sale of that right when it is still contingent on his living, i. e., prior to the beginning of the twenty-eighth year. If Congress intended him to be able to dispose of it before that time, why did it not confer on him a single fifty-six year term? Why did it provide for a renewal, and explicitly prevent its exercise at an earlier date? Plainly, as Congress said, because it wanted the author to be unable to sell it "outright to a publisher for a comparatively small sum"—as he endeavored to do in this very case. Here the attempted "outright" sale of the renewal right occurred in 1917, twenty-two years before the right came into existence (i. e., 1939). If Congress contemplated that the author should be able to make such a [fol. 117] sale at so early a date, then it put him in the worst possible position to do so for an adequate consideration: As any member of Congress with any sense must have seen, the sale value prior to the twenty-eighth year, 1939, would be small, because the purchaser would be buying a gamble on the author's longevity. In other words, to repeat, if such an early sale was to be allowed, the best arrangement for the author would have been a single term of fifty-six years, for then the gambling element would not inhere in the sale. But Congress explicitly rejected that arrangement. Why? "In order," the Committees said, to safeguard the author "in his old age." That explicit intention is frustrated by the majority's interpretation. The

result of that interpretation is that the protection of the author "in his old age" becomes "a teasing illusion like a munificent bequest in a pauper's will."<sup>7</sup>

The majority opinion itself demonstrates that the benefit to the author of any such an early sale must necessarily be trifling: In discussing the small consideration paid by the plaintiff to Graff, in 1917—over two decades before the renewal date—the majority opinion says that it was adequate because of "the well-known ephemeral nature of popular song hits." Which is to say that in 1917 no one could be expected to pay more than a slight sum for the renewal right to even a most successful song, especially since the purchased right would be valueless unless the author were alive in 1939. Since, as the majority opinion thus acknowledges, an early sale must, inevitably, mean a negligible price, how can the Congressional purpose of protecting the old age of the author be reconciled with the alleged permission to make such a sale? A small sum received by an author when a young man will do little to help him twenty years or more later, in his declining years.

[fol. 118] The statute as interpreted by the majority means merely this: An author cannot make a *direct* "outright" sale before the twenty-eighth year. But, say my colleagues, he can do so by *indirection*—by making (twenty-two years earlier as here) a specifically enforceable agreement, absolutely binding on him, to have it assigned in his name as soon as the twenty-eighth year arrives. The majority opinion admits that the difference between such a transaction and the forbidden direct "outright" sale is of the tweedle-dum-and-dee variety. The *hocus-pocus* employed by the plaintiff makes clear the artificial character of the distinction: The plaintiff, M. Witmark & Sons, relies for its title to the song on an assignment executed in 1939 "to M. Witmark & Sons," signed by George Graff "by M. Witmark & Sons" as George Graff's "appointed attorney." Congress could not have intended that its admitted purpose—to prevent a direct sale prior to the twenty-eighth year—should be so easily circumvented. If it had intended that an anticipatory assignment should be valid, it is strange that in the course of a century, since 1831, it has provided no machinery by which the assignee might perfect the re-

<sup>7</sup> Mr. Justice Jackson concurring in *Edwards v. California*.—U. S.—(November 24, 1941).

newal in his own right and in his own behalf and without resort to such *hocus-pocus*.

It was said of the Statute of Uses,<sup>8</sup> that it failed in its purpose and, because of hostile judicial interpretation, had the effect merely of "adding three words to a conveyance." A similar gutting of a statute, by interpretation, will result from my colleagues' decision here.

That my colleagues are obviously uneasy about their interpretation of the Congressional intention expressed in the 1909 Committee report is demonstrated by their desperate recourse to bills subsequently introduced but which failed [fol. 119] of passage. Only one of these bills progressed as far as passage by one house of Congress. And since, in one way or another, all those bills expressly provided for assignment of the renewal term, they might be said to show—if they show anything—not, as the majority would have it, "a recognition of the validity under the 1909 Act of assignment of the renewal term," but, on the contrary, that the draftsmen believed that amending legislation was needed to validate such an assignment. While proposed but unsuccessful legislation is at best a feeble basis for statutory interpretation, the only sort of proposed bill which would have had any clear significance, as showing the validity of an assignment under the 1909 Act, would have been one which sought to deprive the author of the power to assign the renewal, or one which explicitly stated that such assignments should thereafter, as theretofore, be valid; but no such proposal was ever made.

The majority opinion cites, in support of its interpretation, the views of seven text-book writers; yet the majority opinion concedes that one such "expert" denied the power to make an early assignment and that the other six either "hedged" or were only "fairly" definite. There is then no evidence to support the majority's comment that the statute "has fairly uniformly been interpreted one way" by the "experts." And there is not a scrap of evidence, in or out of the record, to sustain my colleagues' statement that "it seems not unreasonable to conclude" that such a belief (i. e., that renewal rights are thus assignable) "doubtless exists throughout the trade."

<sup>8</sup> Perhaps not altogether accurately, see Radin, *Anglo-American Legal History* (1936), 435; 4 Holdsworth, *History of English Law*, 467 *et seq.*

My colleagues also refer to a comment made in an opinion of Acting Attorney General Fowler. But they disregard the fact that, as that opinion discloses, it was in response to the question whether assignees under "direct assignments of the renewal" are "entitled to renewals"; that the [fol. 120] answer to that question was in the negative; and that the remark quoted in the majority opinion here was made merely in passing, as is shown by the following statement: "It is not intended in this opinion to determine any question of law which relates to the relative rights of authors and their assigns, and such rights are mentioned only by way of illustration or argument." Thus qualified, an *obiter* in such an opinion is entitled to little weight.

It was argued by plaintiff that Congress, when enacting the 1909 Act, must be deemed to have had in mind the judicial interpretation of the 1831 Act, and that the later Act must therefore be construed as the majority construes it. But there had been no clear judicial interpretation of the 1831 Act along those lines. It is not at all plain that, in *Paige v. Banks*, 13 Wall. 608 (1871), the court, in passing on a contract made in 1828, was thus construing the 1831 Act, as distinguished from the preceding Act of 1790, which differed in its provisions. That Judge Putnam, in *White Smith Music Co. v. Goff*, 187 Fed. 247, 253, understood *Paige v. Banks*; *supra*; as relating solely to the 1790 statute goes to show that it cannot be said that it was clear to Congress in 1909 that the Supreme Court had held that under the 1831 Act the contingent renewal privilege was alienable by the author prior to the date fixed for renewal. In the face of that ambiguity, not much weight should be given to the rule of statutory construction that, when a legislature uses, without change, statutory language which has previously received judicial interpretation, the language of the statute is read in the light of such interpretation. That rule of construction has been much weakened of recent years. The Supreme Court, in *Helvering v. Hallock*, 309 U.S. 106, 119, said: "To explain the cause of non-action by Congress when Congress itself sheds no light is to venture into speculative unrealities. Congress may not have had its attention directed to an undesirable decision; and [fol. 121] there is no indication that as to the *St. Louis Trust* cases it had, even by any bill that found its way into a Committee pigeonhole. Congress may not have had its attention so directed for any number of reasons . . . .

Various considerations may be suggested for the inaction . . . but they would only be sufficient to indicate that we walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle."<sup>9</sup> It should be noted that there is nothing in the report of the Committee dealing with the 1909 Act which refers to *Paige v. Banks, supra*. And, at best, the suggested rule of statutory construction is only one means—"neither final nor conclusive"—of ascertaining the legislative intent, which must give way to more lucid indications of that intent, such as we find here in the Committee reports. Cf. *Helvering v. Stockholms Enskilda Bank*, 293 U. S. 84, 89; *Boston Sand Co. v. United States*, 278 U. S. 41, 48.

The following considerations reinforce my interpretation of those reports: The Constitution expressly states the very limited purposes for which Congress may authorize patents and copyrights as follows: "to promote the Progress of Science and useful Arts by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." [For the historical background of this clause, see Hamilton, *Patents and Free Enterprise*, T. N. E. C. Monograph No. 31, 11-27.<sup>10</sup>] A [fol. 122] copyright or patent statute should fulfill that constitutional purpose; if it promoted a monopoly primarily for the benefit of manufacturers or publishers, rather than basically as a reward to inventors or authors, it would verge on unconstitutionality.<sup>11</sup> To the effect that we must keep a

<sup>9</sup> Cf. *Neirbo v. Bethlehem Shipbuilding Corp.*, 308 U. S. 165, where the statute had been left unchanged for half a century after decisions which in that case were repudiated by the court. In *Erie R. Co. v. Tompkins*, 304 U. S. 64, the statute had not been changed during almost a century of judicial interpretation, despite proposals to amend it; see dissenting opinion of Butler, J., 304 U. S. at 86.

<sup>10</sup> A brilliant criticism of the conventional descriptions of the fight on monopolies waged in the reigns of Elizabeth and James I is made in a study by Goldwater, *The Anti-Monopoly Movement in England, 1606-1624* (unpublished, 1939).

<sup>11</sup> Of course, in order to aid the inventor or author, there must be, via the patent or copyright, *some* incentives to manufacturers or publishers.

sharp eye on the Constitutional purpose of this clause, see *Cuno Engineering Corp. v. Automatic Devices Corp.*, — U. S. 2 (November 10, 1941) and *Morton Salt Co. v. G. S. Suppiger*, — U. S. — (January 5, 1942), which disclose a back-to-the-Constitution movement in a field in which the simple words of the Constitution are regarded as at least as good a guide as (if not a better one than) the reams of gloss which have been written since 1789. *West Coast Hotel Co. v. Parrish*, 300 U. S. 379, 391;<sup>12</sup> *Wisconsin v. J. C. Penney Co.*, 311 U. S. 435, 444; cf. Frankfurter, J., concurring in *Graves v. New York ex rel. O'Keefe*, 306 U. S. 466, 491: "But the ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it." It is worthy of note, also, that while the individual inventor seems to be rapidly giving way to the corporate research laboratory, so that the patent grant is no longer the same kind of stimulus to personal genius that it once was (see Hamilton, *ibid.*, 152-158),<sup>13</sup> no such development has taken [fol. 123] place among authors and song-writers. With respect to such persons, the full achievement of the objectives of the Constitutional provision is still easily possible. An interpretation of the Copyright Act which gives them adequate protection will bring that statute more closely in line with the Constitution than will the interpretation adopted by my colleagues. And that the *Constitutional limitation was clearly in the mind of Congress in 1831—when the statutory provisions here in question were first adopted*—is highly likely; for, just two years earlier, in 1829, the Supreme Court was stressing the language of the Constitutional provision far more than it subsequently did until a

<sup>12</sup> There the court, in repudiating expressions found in *Atkins v. Children's Hospital*, 261 U. S. 525, said: "The Constitution does not speak of freedom of contract."

<sup>13</sup> This is not to say that the development of the corporate research laboratory calls for the elimination of the patent system, but merely that, as many persons have recently suggested, that development may necessitate an overhauling of the patent system if it is to serve the constitutional objective. Cf. L. Hand, J.: "Perhaps the [patent] system is out-worn." — *Dewey & Almy Chemical Co. v. Minex Co., Inc.*, — F. (2d) — (January 5, 1942).

very recent date.<sup>14</sup> I note here once more this statement in the 1831 report: "The question is whether the author or bookseller shall reap the reward." The answer of the Committee, constrained by the Constitution, was, necessarily, "the author." Yet the result of the majority opinion in this case is to give the other answer—"the bookseller." For a small price paid in 1917, the "bookseller", here (so the majority rules) acquired the author's contingent right which, when it came into being in 1939, was immensely valuable. And, as already shown, the majority recognizes that, inevitably, the acquisition for an insubstantial sum must be the consequence of permitting a sale of the contingent renewal right at an early date, *so that, if there is any substantial reward going to anyone from the renewal, it will not, in such circumstances, enure to the author.*

The inherent difference between the difficulties involved in exploiting a patent and a copyright must always have [fol. 124] been apparent. And it is noteworthy that at one time, when Congress provided that patents should, on a certain showing, be renewable for an additional period, it expressly provided, as it did not do equivalently as to copyrights in the 1831 or 1909 Copyright Acts, "And the benefit of such renewal shall extend to assignees and grantees of the right to use the thing patented, to the extent of their respective interest therein" \* \* \* \* \*<sup>14a</sup>

3. The chief prop of the statutory interpretation adopted by the majority opinion is that our society rests on the theory that men should have the greatest possible liberty to make such contracts as they please. I agree that that has, for long and, on the whole, desirably, been, in general, the American attitude. But while, during a part of the 19th century, the devotion to that theory was peculiarly

<sup>14</sup> In *Pennock v. Dillingham*, 2 Pet. 1 (1829) Mr. Justice Story emphasized the constitutional provision. Later, a majority of the court paid it less attention (although there was a deviation in 1882, in *Atlantic Works v. Brady*, 17 Otto 492). After a long detour, the court has recently returned to the earlier attitude. See *Cuno Engineering Corp. v. Automatic Devices, supra*.

<sup>14a</sup> 1836 Patent Law, 5 Stat. at L. 125, Sec. 18. This renewal feature was omitted in the Patent Act of 1862 and since then.

intense, there have been in our history changes in that intensity, as this court has candidly recognized several times within recent weeks. Thus one manifestation of the most extreme enthusiasm for "liberty of contract" was the notion that courts must never depart from "the intention of the parties" to a contract. Yet our court, about a month ago, frankly confessed that that idea was a pious fiction, saying, in an opinion written by Judge Clark, that there had been much confusion in judicial statements concerning "implied" negative covenants and adding, "One may perhaps conclude that in large measure this confusion arises out of the reluctance of courts to admit that they were to a considerable extent 'remaking' a contract where it seemed necessary and appropriate so to do. 'Intention of the parties' is a good formula by which to square doctrine with result. That this is true has long been an open secret." *Paper Products Co., Inc. v. L. Rocheach & Sons, Inc.* — F. (2d) — (December 24, 1941). And our court has stated [fol. 125] that, to the consensual act of the parties in entering into contracts, the courts have attached many obligations which were not in the minds of the parties, that a contract creates a status which imposes such obligations because of considerations of policy.<sup>15</sup>

Consequently, it is surprising that my colleagues, uncharacteristically, in this particular case interpret the statute as if, today, laissez-faire were still in fullest bloom—as if there were still so strong a presumption against any and all restrictions on the freest possible bargaining that only the plainest language can overcome it, so that the desire of Congress to clasp alienability of an author's rights, in order to protect him, must be disregarded unless that desire is set forth in wording as precise as that found in a general release.

Such was, to be sure, the attitude of the courts during the latter part of the 19th century. As Dean Pound has said,<sup>16</sup> it was then "taken for gospel that law was moving and must move in the direction of abstract individual self-determination by free control. \* \* \* The judges were imbued with genuine faith in the \* \* \* doctrine of

<sup>15</sup> *United States v. Forness*, 125 F. (2d) 928, 936, note 25 (January 20, 1942); *Hume v. Moore-McCormack Lines*, 121 F. (2d) 336, 342-343, notes 18-22.

<sup>16</sup> *Interpretations of Legal History* (1923) 60ff.

progress from status to contract.<sup>17</sup> Hence it seemed to them that the constitutional requirements of due process was violated by legislative attempts to restore status and restrict the contractual powers of free men by enacting that men of full age and sound mind in particular callings should not be able to make agreements which other men might make freely . . . . This attitude resulted in "an inconsistency between the doctrine of progress from [fol. 126] status to contract, as the last generation understood it," and the principles of equity which had developed in our law, especially in the seventeenth and eighteenth centuries. The state courts held for two decades that legislative imposition of contractual incapacities in the relation of employer and employee was arbitrary and hence unconstitutional. But there were existing incapacities with which they did not think of interfering. The surviving common law incapacities could be idealized as 'natural incapacities.' Usury laws were not so easy to explain. But courts said that there had been such laws from the beginnings of American legislation, and some, ignorant of English law-making, that they were immemorial and universal. In other words, they were familiar historically and hence reasonable. There remained equitable restrictions on free contract, the doctrine as to penalties, the refusal to allow the holder of a penal bond to recover more than the actual damages, the doctrine of redemption of mortgaged property after the condition had become absolute, the rule against clogging the equity of redemption, the rules as to sailors' contracts and sales by reversioners. An eighteenth century chancellor had explained these by saying that necessitous persons were not free.<sup>18</sup> But the courts shrank from so recognizing the facts of industrial employment in the face of the abstract freedom which they had set up as an ideal. The best they could say was that the equitable incapacities also were historical. This amounted to holding that the legislature was unable to create new contractual incapacities; that the lines had been drawn forever in the seven-

<sup>17</sup> That this "doctrine" involved a misinterpretation of Maine's epigram, see *United States v. Forness*, *supra*, note 25.

<sup>18</sup> As Chief Justice Taft was to say in 1927; see *American Steel Foundries v. Tri-City Council*, 257 U. S. 184, 209.

teenth and eighteenth centuries and that no new type of disability could be recognized. Nor did it matter that the [fol. 127] underlying principle of these new statutory disabilities was the same as that underlying the disabilities imposed by equity."

The theory of laissez-faire was that the state, the government, was not to interfere beyond a bare minimum. That such was not the actual practice, even when laissez-faire was in its zenith, has been brilliantly shown in the writings of Robert Hale, beginning in 1923.<sup>19</sup> His thesis may be paraphrased thus: In outward appearance, under let-alone-ism, the extensive use of state power is rejected. In fact, however, there is a transference of much of the State's power to individuals. The contracts they make (so far as they are lawful) are enforced and protected by the State through the orders of its courts and its sheriffs. More than that, the individual has a right to refuse to sell or use his property on any terms or except on his own terms. If someone else tries to make him sell or use it except on those terms, the State, through its courts and sheriffs, will protect him from such intrusions. Liberty to contract includes liberty not to contract if one pleases. And government backs up that liberty. Laissez-faire does not mean that the State has given up most of its "interferences," but that the State is used to "interfere" in new ways at the demand of individuals. The power of government is thus exercised, indirectly, by the individual to enforce his bargains and to punish those who try to make him bargain except as he chooses.<sup>20</sup> The Hale thesis involves

<sup>19</sup> See *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 Pol. Sci. Q. (1923) 415; *Force and The State*, 35 Col. L. Rev. (1935) 149; *Our Equivocal Constitutional Guarantees*, 39 Col. L. Rev. (1939) 563.

<sup>20</sup> Hale's ideas were subsequently restated (although independently) by M. R. Cohen, who says that our "law of contract" puts the sovereign power of the State at the disposal of one party to a contract. From this point of view, the law of contract may be viewed as a subsidiary branch of public law, as a body of rules according to which the sovereign power of the State will be exercised as between the parties to a more or less voluntary bargain. If then the law of contract confers

some over-statement. But its dramatic challenge of the conventional thesis helps us to attain a new and valuable perspective. It serves to highlight the public interest in individual contracts. Because of it, we can better understand why, at no time, did let-alone-ism go so far as to obliterate all direct governmental interference with contracts; why, even in the hey-day of laissez-faire, there were retained such doctrines as the rule against perpetuities and the rules as to restraints on alienation, dower rights, spendthrift trusts, the voidability of infants' contracts, etc. Laissez-faire, in other words, meant a shift of emphasis; older attitudes were not killed off, but merely submerged. Hale aids us to see the legitimacy of the State's now openly acknowledged interest and direct interference in many kinds of contracts. Nothing, it has been said, exceeds like excess. Laissez-faire went too far.

It is helpful to make an historical approach to the chief interpretative device employed by my colleagues. Their opinion, I note again, relies, in effect, on a supposed spirit of our institutions, tenaciously opposed to all restraints on freedom to contract, which, it is urged, must be read into all American legislation. To make that thesis applicable here, my colleagues must assume that that spirit was operative a century ago when the 1831 Copyright Act was enacted; for the 1909 Act, it is conceded, took over from the earlier statute the provisions which we are considering in the case now before us; accordingly the relevant "time spirit" is that of 1831. In purporting to find such a spirit, then and still [fol. 128] operative, my colleagues are, I think, misreading history. Both they and many of those who have criticized

sovereignty on one party over another (by putting the State's force at the disposal of the former) the question naturally arises: For what purposes and under what circumstances shall that power be conferred?<sup>12</sup> M. R. Cohen, *The Basis of Contract*, in Cohen, *Law and The Social Order* (1933) 69, 103-104; cf. Cohen, *Property and Sovereignty*, 13; Corn, L. Q. (1927) 8; cf. J. M. Clark, *Social Control of Business* (1926) 132.

<sup>12</sup> To the effect that in construing a statute, we may return to the history of the time when it was passed, see *Great Northern Ry. Co. v. U. S.* — U. S. — (February 21, 1942).

views such as they have expressed<sup>21</sup> have made history too smooth, have oversimplified it: Even in the so-called period of laissez-faire, of course, as in almost any so-called "historical period," there were *numerous currents and cross-currents, not a single drift in one direction.*<sup>22</sup> The casual observer sees only the current at the surface. And so with excessive laissez-faire: It was merely—and for a relatively short time—the surface current. In the early days of the République, mercantilism was still visibly powerful.<sup>23</sup> Alexander Hamilton was certainly not wholly in the grip of that "old Adam"—Adam Smith. Mercantilist notions—and even medieval notions<sup>24</sup>—persisted throughout the 19th century in America, and in many matters made themselves felt.<sup>25</sup> When the 1831 Copyright Act was enacted, whole-hog laissez-faire was not yet fashionable.

<sup>21</sup> Dean Pound, for instance:

<sup>22</sup> Cf. *United States v. Forness*, 27 F. (2d) — (January 20, 1942).

To shift the metaphor, and to use ten-dollar words, there is much cacophony in the symphony of history. Or to restate it, there is usually, at any given moment, not one "spirit of the age," but many such spirits. The bias, conscious or unconscious, of the particular historian will often explain why he chooses one special spirit for emphasis.

<sup>23</sup> Cf. Hamilton and Adair, *The Power to Govern* (1937).

<sup>24</sup> Of course, the labels "medieval," "mercantilism" and "laissez-faire" are each vague catchwords. Each of them symbolizes a complex or congeries of acts and attitudes having many sources. As to some of the many facets and components of laissez-faire, see e.g., Wingfield-Stratford, *The Victorian Cycle* (1935); Clarke, 3 Vol. Sé. Q. (1888) 549; reprinted in Beard, *Introduction to The British Historians* (1906) 609, 612ff; Hamilton and Braden, *The Special Competence of the Supreme Court*, 50 Yale L. J. (1941) 1319, 1320, note 11; Sabine, *A History of Political Theory* (1937) 656-665, 672.

<sup>25</sup> As to domestic policy, they did in England, too, moving towards the surface earlier there than in this country; cf. *Hume v. Moore-McCormack Lines*, 121 F. (2d) 336, 340 and note 12. Our protectionist policy as to foreign affairs was akin to mercantilism.

[fol. 130] However, the vocabulary of full-fledged let-alone-ism became the style with the average well-to-do "educated" American after the Civil War.<sup>26</sup> For a span of years, the constricting vocabulary of ultra-let-alone-ism was fashionable with much of our judiciary. As is not seldom true, the judicial fashion was out of step with a budding popular fashion in words and thoughts outside the court houses.<sup>27</sup> What the courts were saying was not necessarily an index of what Congress had in mind: We lawyers are too much inclined to take our history in legal capsules; we restrict our history reading too much to what we find in the law books, neglecting the fact that "there waft into the courts only occasional gusts in the varied and perpetually changing weather of . . . 'transactions' occurring in the outer world. 'A climate cannot be delineated from a jar of captured raindrops.'"<sup>28</sup> Even, however, in the court-houses,

<sup>26</sup> Not until we reach the opinions of Mr. Justice Field in the *Slaughter House Cases*, 16 Wall. 36, 110 (1873) and *Butchers Union v. Crescent City Co.*, 111 U. S. 746, 757 (1884) do we find Adam Smith's views as to the virtues of individual egotism as the prime protector of public welfare quoted judicially as final and authoritative. In *Veazie Bank v. Fenno* 8 Wall. 553, 541 (1869) Smith was referred to with great respect; but his views on taxation were there said not to have guided the Founding Fathers. Cf. *Pollock v. Farmers' Loan & Trust Co.* 157 U. S. 429, 555, 630-631, 639-640 (1895).

<sup>27</sup> "If a statute . . . is apt to reproduce the public opinion not so much of today as of yesterday, judge-made law occasionally represents the opinion of the day before yesterday. But with this statement must be coupled the reflection that beliefs are not necessarily erroneous because they are out of date; there are such things as ancient truths as well as ancient prejudices." Dicey, *Law and Opinion in England* (24 ed., 1914) 369.

<sup>28</sup> Goebel, Editor's Introduction to DuBois, *The English Business Company After The Bubble Act* (1938) vii.

Professor Walter B. Kennedy remarks "that thirty years before the United States Supreme Court declared the Minimum Wage Law of the District of Columbia to be unconstitutional, Pope Leo XIII vehemently defended the right of the worker to a living wage in his famous encyclical, *Rerum Novarum*, and argued for such economic reform on the ground of natural law and natural justice." *My Philosophy of Law* (1941) 147, 159.

[fol. 131] there were those who, not long after the Civil War, asserted their independence of the style, in words and ideas, generally prevailing in the court-rooms. Chief Justice Waite was one of them. See *Munn v. Illinois*, 94 U. S. 113 (1877); *Holden v. Hardy*, 169 U. S. 366 (1898) and *Knoxville Iron Co. v. Harbison*, 183 U. S. 13 (1901), are also impressive as signs that the judicial thought-ways were not constantly running towards one point in the compass. The subsequent tussle between opposing attitudes is disclosed in a series of dissenting opinions—with Holmes as leader of the dissenters<sup>29</sup>—which, latterly, have become the majority doctrine.<sup>30</sup> It will not do, then, to interpret Congressional committee reports, either in 1831 or 1909, as if they were the words of men with but a single and inflexible thought as to the folly of ever interfering with contracts.

Excessive judicial worship of let-alone-ism began, then, to melt away in the 1920's and has disappeared in the de-

<sup>29</sup> Sometimes his views prevailed: In *Noble State Bank v. Haskell*, 219 U. S. 104 (1911) he spoke for the Court, announcing in effect, that the judiciary, in a democracy, should, when possible, accept the ideas prevailing with the majority of the people as expressed in legislation. Zane, shocked by that decision, denounced it as a capitulation to the wicked ideas of the Germans, with whom we were then at war. See Zane, *German Legal Philosophy*, 16 Mich. L. Rev. (1918):287; cf. 2 Holmes, *Pollok Letters* (1941), 3; 6, 42. And, for a time, the majority of the Court turned its back on the views expressed in the *Noble State Bank* case.

The story of the course of judicial attitudes in this field is excellently told by Paxton Blair, *Bench, Bar and Social Change*, an address before the N. Y. State Bar Ass'n, January 24, 1842.

<sup>30</sup> Informed by the past, we should, with proper scepticism, regard the view now prevailing as a new fashion, not certain to last forever, even if we admire it. Certainly there are other opposing views not far below the surface. That is no cause for regret: They may prevent a drift of opinion from becoming a flood which will erode too much.

For some healthy scepticism concerning the current anti-laissez-faire drift by one who likes it, see Bossard, *Sociological Fashions and Societal Planning*, 14 Social Forces (1935) 186.

[fol. 132] cisions, during the last decade, of the Supreme Court.<sup>31</sup> "Whatever may be one's opinion about the wisdom of trying to save the ignorant and rash from folly, it is a recognized power that is used in many ways," said the Court, in 1924, in *Dillingham v. McLaughlin*, 264 U. S. 370, 374, construing a New York statute. We are obliged no longer to hold that the power to prevent the free disposal of rights was exhausted in such non-statutory rulings, for instance, as that contracts by public officers, executors and receivers assigning their future earnings will not, on grounds of public policy, be enforced;<sup>32</sup> or in the doctrine that equity will refuse to grant specific performance of improvident contracts. Indeed, we have been warned by a successful commercial banker and by able economists that the passion for excessive liquidity—the eagerness to make every kind of property or idea immediately convertible into cash—was one of the causes of the Great Depression which began in 1929, and that, unless we do something to curb that zest for instant monetization of everything, our profit economy may collapse.<sup>33</sup>

The former judicial repugnance to any legislative interference with free bargaining involved a blindness to the effects on the public—the community—of the conduct of individuals. Lately, we have begun to see that any business is "affected with a public interest," if the legislature so decides.<sup>34</sup> In reaching that conclusion, the courts have, [fol. 133] once more, realized that what one man does with his life often affects all the rest of us. If he is infected by a disease, many others may be victimized. If he con-

<sup>31</sup> See discussion of this change and citation of pertinent cases in *Hume v. Moore-McCormack Lines*, 121 F. (2d) 336 (C. C. A. 2, 1941).

<sup>32</sup> *In re Furness*, 72 F. (2d) 965; *Fischer v. Liberty Bank & Trust Co.*, 61 F. (2d) 757; *Bliss v. Lawrence*, 58 N. Y. 442, 445, 450; *Matter of Worthington, et al.*, 141 N. Y. 9, 12.

<sup>33</sup> See testimony of Ralph W. Manuel, President, Marquette National Bank of Minneapolis, May 22, 1939, before the Temporary National Economic Committee, Hearings, pp. 3710, 3713-3724; Berle and Pederson, *Liquid Claims and National Wealth* (1934).

<sup>34</sup> *Nebbia v. New York*, 291 U. S. 502 (1933).

tracts dire poverty, crime may result and a large group may suffer.<sup>35</sup> And so it is with free bargaining.<sup>36</sup> For a contract may be something more than a private affair of the contracting parties; it may vitally affect the interests of the public. Once, that was the prevailing view: in the mediæval period, and for a long time subsequently, it was taken for granted that there was an overriding social or public aspect of individual trafficking. Cf. *Heme v. Moore, McCormack Lines*, 121 F. (2d) 326, 338. That emphasis in England on the public obligations of private persons was, however, exploited in the interests of dictatorial royal dynasts and, later, to benefit an economic oligarchy.<sup>37</sup> A revolt of enterprising individuals resulted. Their slogans were laissez faire and the natural rights of the individual. As is natural in all revolts, absolute claims on one side were met with absolute denials on the other. Hence the theory of the natural rights of the individual took not only an absolute but a negative form: men have *inalienable* rights, the State must never interfere with private property etc.<sup>38</sup> In the fierce fight against numerous irrational, tyrannical and oppressive restraints, men jump to the conclusion that the absence of all restraint is a good in itself and indeed the one absolute good. [fol. 134] Recognition today of the unwise of excessive liquidity or excessive individualism does not at all mean a commitment to rigidity, regimentation, or undue paternalism. Cf. Russell Davenport, *This Would Be Victory*.

<sup>35</sup> *Carmichael v. Southern Coal Co.*, 301 U. S. 468, 516-517 (1937).

<sup>36</sup> See Paxton, Blair, *loc. cit.*

<sup>37</sup> See, e.g., Wingfield-Stratford, *A History of British Civilization* (1928) 498ff; E. M. Clark, *Social Control of Business* (1926), 26ff.

<sup>38</sup> M. R. Cohen, *Property and Sovereignty*, 13 Cornell L. Q. (1927) 8, reprinted in Cohen, *Law and The Social Order* (1933) 41, 57.

<sup>39</sup> M. R. Cohen, *The Basis of Contract*, 46 Harv. L. Rev. (1933) 553, reprinted in Cohen, *Law and The Social Order* (1933) 69, 75-76.

24 Fortune (1941) 45, 136-144. Here, as almost everywhere in life, there is need for intelligent compromise.<sup>49</sup>

<sup>49</sup> Cf. *Hudson Water Co. v. McCarter*, 209 U. S. 349, 355; dissenting opinion in *Chrestensen v. Valentine*, 122 F. (2d) 541, 522-523 (C. C. A. 2); *Clark v. United States*, 289 U. S. 1, 13.

It is of interest, in the light of subsequent events, to compare the absolutistic arguments of Joseph Choate, asserting before the Supreme Court in 1895 that any federal income tax would bring about communism, with those of James Carter, in the same case, that such a tax, intelligently applied, by reducing the undue concentration of wealth, would help to prevent communism and the breakdown of democracy. (See *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429 (1895). For Choate's argument, see page 532.)

Carter, a conservative lawyer and one of the leaders of the bar, arguing, on behalf of a trust company, in favor of the constitutionality of the tax, said (p. 517): "It is alleged by the counsel for the appellant that the income tax—and this they consider its most monstrous form of injustice—falls upon two per cent only of the population of the United States; but what must we think of the fact that this two per cent have been paying but a trifle more than two per cent of the \$500,000,000 [of taxes] while of the annual income of the nation, after deducting what would be sufficient to furnish a living for the people, they have been receiving probably more than fifty per cent? At the same time another impressive and startling fact not adverted to by them, has also been receiving more and more of the attention of the people of the country—I mean the growing concentration of large masses of wealth in an ever diminishing number of persons. It was impossible to avoid the suggestion that there was some connection between these striking facts, and it was also impossible that they should not form the point of conflict around which political content would gather. They did finally succeed in dividing the two great political parties of the country. At last the party complaining of these things gained an ascendancy in the legislative counsels and efforts were made to devise a remedy. This income tax is a part of that remedy. The view taken by the Congress which passed the tax law in question is plain upon its face. The object was to redress in some degree the

beware of the either-or dogmatizers. It is unnecessary to make a hard-and-fast, all-or-nothing, antithesis between complete formal individual freedom and complete governmental guardianship for everyone. But it is necessary to observe that individualism, if utterly unrestrained, becomes self-devouring.<sup>42</sup>

"More and more," said Lord Macmillan in 1935,<sup>43</sup> "the main issue in political science has come to be—not whether the State should intervene at all in the regulation of our daily lives, but where the *frontier line ought most wisely to be drawn between the province of state activity and that of individual enterprise*. On all hands it is now recognized that the policy of *laissez-faire*, which gave us no

flagrant inequality by which the great mass of the people were made to furnish nearly all the revenue; and leave the very wealthy classes to furnish very little of it, in comparison with their means."

[fol. 135] "Most of the issues of human and social relationships are not of the black-and-white variety."<sup>44</sup> We should

<sup>41</sup> Mr. Justice Douglas, *Democracy and Finance* (1940) 243.

<sup>42</sup> "To put the matter more generally, ought every person of full age, acting with his eyes open, and not the victim of fraud—but who nevertheless is placed in a position in which from the pressure of his needs he can hardly make a fair bargain, to be capable of binding himself by a contract? If these and the like questions be answered in the affirmative, an individual's full contractual capacity is preserved, but he is in danger of parting, by the very contract which he is allowed to make, with all real freedom. The difficulty is in all these cases the same; there is a perpetual danger that unlimited contractual capacity which is looked upon as an extension of individual freedom, may yet be so used by some individual as to deprive himself of the very freedom which it is assumed to be the exercise." Dicey, *Law and Opinion in England* (2d. ed. 1914) 152-153; cf. 260ff.

See also Dawson, *Economic Duress and Fair Exchange in French and German Law*, 11 Tulane L. Rev. (1937) 346; 12 *ibid.* (1937) 43; Cohen, *The Basis of Contract*, *supra*.

<sup>43</sup> *Law And Other Things* (1937) 1, 7-9.

doubt our industrial and commercial supremacy but also gave us our slums and many other attendant evils, must give place to a new regime. \* \* \* We have traveled far since Tom Paine—that early champion of the people's rights—proclaimed that "The more perfect civilization is, [fol. 136] the less occasion it has for government. \* \* \* Sedgwick \* \* \* recognized that \* \* \* social legislation is essential to the preservation of the liberty of the individual. Such measures, he saw, may promote rather than diminish freedom."<sup>44</sup>

When the philosophy of 100% individualism was in vogue, the courts often soft-pedalled such considerations. They devised and interpreted legal rules and read statutes under the influence of their own notions of public policy. That process may have been largely unconscious. But, as Mr. Justice Holmes often said, there was strong policy-making in those judicial decisions.<sup>45</sup> The judges who decided them also uttered verbal repudiations of judicial legislation.<sup>46</sup>

<sup>44</sup> In 1909, President Taft advocated the establishment of a postal savings bank. He replied to some of his critics who, he said, argued that such a bank "is a very paternalistic institution; that it has a leaning towards state socialism. \* \* \* Now I am not a paternalist, and I am not a socialist, and I am not in favor of having the government do anything that private citizens can do as well or better. \* \* \* [But] we have passed beyond the time of \* \* \* the laissez-faire school which believes that the government ought to do nothing but run a police force." See Pringle, *The Life and Times of William Howard Taft* (1939) 518.

<sup>45</sup> See e.g., Holmes, *Science and The Common Law* (1879) reprinted in Holmes, *Book Notices, etc.* (Shriver, 1936) 10-11; *Vegelahn v. Guntner*, 167 Mass. 92 (1896); *The Path of the Law* (1879); *Collected Legal Papers* (1920) 181, 184.

<sup>46</sup> For candid avowals that there is and (within proper limits) must be judicial legislation, see Holmes, *J., Southern Pacific Company v. Jensen*, 243 U. S. 221 (1917); Cardozo, *The Nature of the Judicial Process* (1921) 19, 103, 113, 146-149; Dicey, *Law and Opinion in England* (2d ed. 1914) 361-398, 483-494; Thayer, *A Preliminary Treatise on Evidence* (1898) 318-319, 327, 331; Dickinson, *Administrative*

But the demolition of the purposes of Congress, through stingy statutory interpretation, is the most emphatic kind [fol. 137] of judicial legislation.<sup>47</sup> Our job is, so far as possible, to enforce the aims of Congress. We should, in the instant case, carry out what Congress meant to achieve for the protection of authors in the Copyright Act, and should not carry out, without modification, the policy of the judicial legislation found in the judicial decisions of the let-alone-ist era.

It is of considerable interest to note some of the cases cited by the majority to support their assertion that the Copyright Act must be read in the light of an alleged strong policy, said to be embedded in our legal system, unfriendly to any "restriction on free assignability": (a) There is the citation of an Illinois decision declaring unconstitutional a statute regulating assignments of wages and salaries, *Massie v. Cessna*, 239 Ill. 352, 88 N. E. 152.<sup>48</sup> To cite such a case indicates sympathy, which I doubt whether my colleagues entertain, with an attitude that such legislation, because it interferes with liberty of contract, is invalid; that attitude the United States Supreme Court has, in recent decades, flatly rejected.<sup>49</sup> (b) The majority also cites our recent decision, *In re Barnett*, — F. (2d) — (January 7, 1942) where, following early New York decisions (as we were obliged to do under *Erie v. Tompkins*, 304 U. S. 64),

*Justice and the Supremacy of Law* (1927) 122, note 22; 209, note 23.

What was the law in the time of Richard Coeur de Lion on the ability of a telegraph company to the persons to whom a message was sent?<sup>50</sup> Gray, *The Nature and Sources of Law* (1900) See, 222.

<sup>47</sup> Cf. Paul, 1 *Federal Estate and Gift Taxation* (1942) 44 and note 62, 86-87 and notes 33 and 34.

<sup>48</sup> Curiously, my colleagues cite Fortas, *Wage Assignments in Chicago*, 42 Yale L. J. 526, in which the author severely criticizes cases relying on that holding, and concludes (at p. 557) that "it seems doubtful that any restriction short of prohibition will cure the ills wage assignments have propagated in Chicago."

<sup>49</sup> *Moorehead v. N. Y. ex rel. Tipaldo*, 298 U. S. 587; *West Coast Hotel Co. v. Parrish*, 300 U. S. 379.

we held that an assignment of an expectancy under a will is effective, and cannot be set aside by a trustee in bankruptcy or a judgment creditor; there was in that case no [fol. 138] statutory declaration of a contrary policy, nor was it even suggested that the consideration for the bargain was inadequate. (e) My colleagues also cite what they themselves describe as "the unusual case" of *Kelly v. Kelly*, 11 Cal. 2d 356, in which an interest under a spendthrift trust was allowed, by indirection, to be assigned.

It is important that the "property" here involved is a creature of statute and not a common law "right of property." In *Powell v. Hedd*, L. R. 12 Ch. D. (1879), 686, 688, it was argued that the part owner of a play could grant a license for its production without the consent of the other owners, because, at common law, one tenant in common of a chattel has a right to use the chattel as he pleases. Jessel M. R. rejected this argument saying: "I am not at all inclined to extend the antiquated and barbarous doctrines, which have been set aside partly by the Legislature and partly by the Courts of Equity, to new rights created by statute, and which are of a character wholly different from the rights of property to which these ancient doctrines apply." Cf. Holmes, J., dissenting, in *Truax v. Corrigan*, 257 U. S. 312, 342.

We know today that legal recognition of differences between different types of persons is not incompatible with the concept of "equality before the law," intelligently interpreted. Hughes, C. J., in *Moorehead v. N. Y. ex rel. Tipaldo*, 298 U. S. 587, 627, and in *West Coast Hotel Co. v. Parrish*, 300 U. S. 379, 391. Protection for those unable adequately to protect themselves must be afforded by any civilized legal system.<sup>59</sup> And when Congress has, as in the case of copy-

<sup>59</sup> Our system recognizes divers restraints on complete liberty of contract. Among them are the enforcement of spendthrift trusts; refusal to enforce the contract of a man to stay out of business forever or to allow his arm to be cut off; punishment of those who make suicide pacts, etc. As to the use of standardized contracts of insurance and the like, required by statute, see Isaacs, *Standardizing of Contracts*, 27 Yale L. J. (1917) 34; Llewellyn, *What Price Contract?* 40 Yale L. J. (1931) 704, 731ff; Goebel, *Trends in The Theory of Contracts in the United States*, 11 Tulane

[fol. 139] rights, expressed such a policy, there is no reason why the courts should frustrate it. It has been held that a person included within the provisions of a Workmen's Compensation Act cannot validly contract himself out of the statute; courts have reached that result even when the statute did not prohibit such a contractual waiver of the benefits of the legislation. *Wass v. Bracker Construction Co.*, 240 N. W. 464, 466; cf. *Powley v. Vivian & Co., Inc.*, 169 N. Y. App. Div. 170, 177. Here, where the Committee reports show the legislative intent to arrive at a similar limitation on free bargaining by an author, it is difficult for me to see why we should pay no respect to that intention.

I agree that the courts must not rewrite statutes and import into them what they think desirable when Congress has remained silent. But there is a marked difference between the silence of Congress and a statement of its purpose not expressed with complete nicety, a middle ground between Congress saying nothing and Congress shouting. The guiding principle was formulated as follows by Mr. Justice Holmes:<sup>51</sup>

"We recognize that courts have been disinclined to extend statutes modifying the common law beyond the direct operation of the words used, and that at times this disinclination has been carried very far. But it seems to us that [fol. 140] there may be statutes that need a different treatment. \* \* \* The legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed. The major premise of the conclusion expressed in a statute, the change of policy that induces the enactment, may not be set out in terms, but it is not an adequate dis-

L. Rev. (1937) 413, 421; M. R. Cohen, *The Basis of Contract*, *supra*.

The concept of "coercion by economic pressure" has received over judicial recognition in *United States v. Butler*, 297 U. S. 1, 71. It has been applied to "contract law" in many ways. For a recent case decided by this court, see *United States Navigation Co. v. Black Diamond Lines*, — F. (2d) — (January 5, 1942). Cf. Havighurst, *Consideration, Ethics and Administration*, 42 Col. L. Rev. (1942) 1, 27-30.

<sup>51</sup> *Johnson v. United States*, 163 Fed. 30, 32.

charge of duty for courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before."

Twice recently the Supreme Court has quoted that language with approval and applied that canon of interpretation.<sup>52</sup> I believe it is our duty to do likewise. My colleagues say they are willing to abide by a Congressional policy against assignability of a contingent copyright renewal. I fear that they have just missed a real opportunity to do so.

[fol. 141] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 26th day of May one thousand nine hundred and forty-two.

Present: Hon. Augustus N. Hand, Hon. Charles E. Clark, Hon. Jerome N. Frank, *Circuit Judges.*

M. WITMARK & SONS, Plaintiff-Appellee,

FRED FISHER MUSIC CO., INC., GEORGE GRAFF, JR., Defendants-Appellants, and Mills Music, Inc., Defendant.

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

D. E. Roberts, Clerk.

<sup>52</sup> *United States v. Hutcheson*, 312 U. S. 219, 225 (1941); *Keifer & Keifer v. Reconstruction Finance Corp.*, 306 U. S. 381, 391, note 4 (1939); cf. Stone, *The Common Law in the United States*, 50 Harv. L. Rev. (1936) 4, 13.

[fol. 142]. [Endorsed at] United States Circuit Court of Appeals, Second Circuit. M. Witmark & Sons v. Fred Fisher Music Co., Inc., George Graff, Jr., and Mills Music, Inc. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed May 26, 1942. D. E. Roberts, Clerk.

[fol. 143]. Clerk's certificate to foregoing transcript omitted in printing.

(727)

[fol. 144] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 12, 1942

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on Cover: File No. 46,828, U. S. Circuit Court of Appeals, Second Circuit. Term No. 327. Fred Fisher Music Co., Inc., and George Graff, Jr., Petitioners, vs. M. Witmark & Sons. Petition for a writ of certiorari and exhibit thereto. Filed August 21, 1942. Term No. 327 O. T. 1942.

(2997)